

Missouri Attorney General's Opinions - 1951

Opinion	Date	Topic	Summary
1-51	Jan 8	INTANGIBLES TAX. TAXATION.	Interest on intangible tax computed from date tax is due, which is date of filing return or March 15th where no return is filed.
1-51	Jan 22	PROBATE JUDGE.	Newly elected Probate Judge not disqualified in case wherein he was executor in absence of an objection, in writing, verified by party in interest.
1-51	Feb 20	INTANGIBLE TAX. TAXATION.	Compensation paid to the estate of a deceased partner for the use of tangible partnerships assets is not yield from an intangible and therefore not subject to the assessment of an intangible personal property tax.
1-51	Mar 2	TAXATION. INCOME TAX.	In computing individual state income tax, taxes are allowable deductions only by the person upon whom they are imposed.
1-51	Sept 4	CONSTITUTIONAL LAW. TAXATION OF INCOMES. EXEMPTIONS UNDER HOUSE BILL NO. 104, TAXABLE WHEN.	House Bill No. 104, 66th General Assembly providing up to but not exceeding \$3000 service pay received in any one calendar year exempt from state income tax for 1950, and each year thereafter, unconstitutional and void as to exemptions for 1950, violates Subsection 5, Section 39, Article III, Constitution of 1945.
1-51	Oct 8	ADJUTANT GENERAL. SOLDIERS AND SAILORS.	Eligibility for Missouri World War I bonus determined as of date of consideration and ruling upon of claim, and not date of application.
1-51	Nov 21	WILLS. PROBATE COURT. ADMINISTRATOR WITH WILL ANNEXED.	Probated will should not be allowed. Will presented for probate too late under terms of Section 468.470, RSMo 1949.
4-51	June 8	ELECTIONS. SCHOOL BONDS. ABSENTEE BALLOTS.	Absentee ballots may be cast at special school bond elections.
4-51	Nov 1	Mr. Charles H. Baker	WITHDRAWN
5-51	Jan 5	BONDS. COLLECTOR OF REVENUE.	Attorneys may not be sureties on official bonds.
5-51	Feb 21	Hon. G. H. Bates	WITHDRAWN

5-51	Mar 13	NON-INTOXICATING BEER.	The Director of Revenue may not use a meter machine for the issuance of stamps for malt liquor and non-intoxicating beer.
5-51	Apr 18	SALES TAX. TAXATION – SALES.	Liability of purchaser for state sales tax when sales contracts necessitate delivery of property outside Missouri.
5-51	Apr 30	SALES TAX. TAXATION. SALES.	Transaction in interstate commerce exempt from Missouri Retail Sales Act. Whether merchandise actually passed into interstate movement may properly be the subject of inquiry by the director of the Department of Revenue, and the burden rests with the taxpayer claiming exemption to prove the merchandise sold actually passed into interstate commerce.
5-51	May 7	COUNTY COLLECTOR. COUNTY CLERK.	Fees allowed to county collector and county clerk for making delinquent land lists and back tax book. Accrual of fees to each office for each office for each year of delinquency.
5-51	June 12	CONSTITUTIONAL LAW. COUNTIES. CIRCUIT COURTS. CHANGE OF VENUE.	Proviso in change of venue section applicable to counties of less than 75,000 is constitutional.
5-51	Dec 12	MOTOR VEHICLES.	Registration of a truck when application is made January 1, 1952 should be for one year and an annual registration fee as provided in Section 301.060, RSMo 1949, should be collected.
6-51	Feb 6	INHERITANCE TAX. PROSECUTING ATTORNEY.	Prosecuting Attorney not qualified to act as appraiser in fixing state inheritance taxes.
6-51	Nov 26	CORONER'S INQUEST. "VIEW" PART OF "INQUEST:"	A "view" or "inquest" must be held where the person is "supposed to have come to his death by violence or casualty." In order for the coroner to "view" a body there must be an "inquest." Section 58.610, RSMo 1949, makes exception where some credible person declares under oath that the person came to his death by violence or crime; then the coroner, without a jury, shall view the body and declare the cause of death.
7-51	Jan 16	COUNTY COLLECTOR. OFFICIAL BOND. CONSTITUTIONAL LAW.	Amount of official bond of county collector to be based on largest total collection during any one month of year preceding election. Provision of section 52.020 RSMo 1949 classifying counties of less than 85,000 population into a class, invalid, being in violation of Article VI, Section 8 of Constitution adopted in 1945.
7-51	Apr 12	MAGISTRATES.	The judge of the magistrate court does not have the power to make a retroactive order directing the sheriff to be present and attend the court for the days that he was present thereby entitling him to a fee.

7-51	Apr 20	CRIMINAL PROCEDURE.	It would be permissible to join a felony and a misdemeanor in the same indictment or information.
10-51	Feb 21	COUNTY COURTS. MUNICIPALITIES.	County Court of Pettis County is unauthorized to appropriate funds to the Sedalia Chamber of Commerce fund.
10-51	Feb 26	CORPORATIONS.	Service of criminal process on a corporation must be made on the registered agent of the corporation.
10-51	Apr 13	ELECTION CONTESTS.	Ballot boxes or packages may be opened for recount or correction only in cases of contested elections or other judicial proceedings specifically named in the Constitution.
10-51	Apr 23	SCHOOLS. COUNTY TREASURER. WARRANTS.	In school district lying in two counties school board cannot issue warrant directing county treasurer of one county to pay all district money to treasurer of other county.
11-51	Jan 5	COUNTIES ADOPTING TOWNSHIP ORGANIZATION. COUNTY COLLECTOR OF REVENUE. COUNTY TREASURER. COUNTY ASSESSOR.	When a county adopts the township organization form of county government the county collector of revenue and the county assessor in office at the time when township organization becomes effective in said county, continue to hold their office until their respective terms expire as provided for in Section 14020, R. S. Mo. 1939. The County treasurer under such a situation continues to serve as county treasurer.
11-51	Apr 11	COUNTY COURT. ROADS, VACATION OF.	Petition to vacate road must be publicly read on the first day of the regular term of court at which the petition is presented, and must be publicly read again on the first day of the next regular term. Notice of the filing of such petition must be personally served on persons residing in the district whose lands are crossed or touched by the road sought to be vacated in the same manner as other notices are required to be served.
11-51	Apr 24	TOWNSHIPS.	Townships may anticipate revenue and issue warrants which warrants shall bear interest.
11-51	June 7	OFFICERS. COUNTIES. FEES AND SALARIES.	County treasurer of county adopting township organization to receive salary of not less than \$100 per month. Receives no compensation as ex officio collector where county collector has portion of term of office remaining.
11-51	Sept 18	COUNTY WELFARE OFFICE. COUNTY COURTS.	The county court is under no obligations to furnish quarters or give support to the county welfare office but may make contributions for the maintenance of such office.
14-51	June 25	SOCIAL SECURITY. ST. LOUIS BOARD OF ELECTION COMMISSIONERS.	Members of the Board of Election Commissioners and its employees for the purpose of Senate Bill No. 3, would be covered by an agreement entered into between the City of St. Louis and the state agency extending the benefits of the federal old-age and survivors

			insurance to its employees.
14-51	Aug 29	GENERAL ASSEMBLY. SENATORS. REPRESENTATIVES. LEGISLATIVE DISTRICTS.	Board of Election Commissioners of St. Louis City must redistrict senatorial and representative districts. Districts may have same boundaries as at present.
15-51	Mar 5	PENSIONS. BLIND PENSIONS. SOCIAL SECURITY.	House Bills 97 and 98, 66th General Assembly, relating to blind pensions, do not conflict with the Federal Social Security Act.
15-51	Apr 30	BLIND PENSIONS. DIVISION OF WELFARE.	Construing House Bill No. 97 and House Bill No. 98, pending in the 66th General Assembly of the State of Missouri.
15-51	Aug 9	BLIND PENSIONS.	Amount of payment under House Bill No. 97 and House Bill No. 98, passed by the 66th General Assembly.
17-51	Apr 10	PURCHASING AGENT. PURCHASE OF PUBLIC PRINTING AND OTHER SUPPLIES.	State Purchasing Agent must follow procedure set out in Sections 34.170; 34.200; 34.210; 34.230, RSMo 1949, in purchasing all state printing. "Notice of Change of Purchase Order" not authorized therein cannot be used by him to effect increase or decrease of amount bid for printing or other supplies subsequently to execution of contract by successful bidder and Purchasing Agent. Upon successful completion, delivery and approval of printing or other supplies, bidder entitled to receive only amount of bid, and state not liable for any other sums.
18-51	Jan 8	NEPOTISM. CIRCUIT CLERK.	Circuit clerk may appoint as his deputy the first cousin of his father-in-law without violating the nepotism law in this state.
18-51	Feb 26	BONDS. COUNTIES. COUNTY TREASURER.	County Court of Cedar County required to pay premium on surety bonds executed by the county treasurer and may not cancel said bonds unless the bonds contain a cancellation clause or for cause.
18-51	June 28	SCHOOLS. ELECTIONS.	School district may vote to annex to city district when city has extended limits, even though district within period of two years had previously voted to annex to said city school district.
18-51	Aug 1	SCHOOLS.	School buses upon which licenses have been issued free by the state cannot be leased by school district for purposes other than transportation of school children.
18-51	Sept 30	PURE SEED LAW. PERMIT TO SELL SEED.	Commissioner of Agriculture has no authority to promulgate regulation requiring seed law violator to show cause why he should be issued a seedman's permit for the following year.
18-51	Oct 22	ROADS AND BRIDGES, MAINTENANCE.	The county court may exercise discretion when authorized to maintain a county bridge.

18-51	Dec 31	ASSESSORS. OFFICERS. COUNTY COURT. FEES AND SALARIES.	County assessor in third and fourth class county may appoint and fix compensation of clerical or stenographic assistants as may be necessary for the efficient performance of the duties of his office. Certification must be made to the county court by the county assessor before warrant could be drawn for payment of assistants. Assessor appointing wife as assistant would forfeit office.
19-51	Jan 12	COUNTY BUDGET LAW AS IT AFFECTS JUVENILE COURT IN COUNTY OF THE FIRST CLASS.	County budget officer in county of the first class may not change original estimate of the circuit court, and county court's appropriation order must make appropriation in accordance therewith unless changed by consent of the circuit court.
19-51	Jan 22	Hon. James V. Conran	WITHDRAWN
19-51	July 2	HEALTH. TAXATION. CONSTITUTIONAL LAW.	House Bill No. 307 relating to county public health centers is constitutional, and tax voted for when health centers were organized under former law can be levied. Health centers previously organized to continue under management and control of board of trustees as provided in House Bill No. 307.
19-51	Sept 18	FACSIMILE SIGNATURE.	A facsimile signature when authorized by a party to an agreement is binding upon such party.
19-51	Nov 20	APPROPRIATIONS. BI-STATE DEVELOPMENT AGENCY.	Sec. 4, S.B. 99, 65th General Assembly does not prohibit 66th General Assembly from passing appropriation act effective on or before December 31, 1951 for use of Bi-State Development Agency. Such appropriation may be lawfully obligated during fiscal period described in appropriation act.
19-51	Dec 3	APPROPRIATION. BI-STATE DEVELOPMENT AGENCY.	Effective date of appropriation act determined by Section 1.130, RSMo 1949, Senate Bill No. 99 65th General Assembly may not be amended by an appropriation act.
20-51	Feb 13	COUNTY COURTS. COURTHOUSES. PROBATE COURTS. MAGISTRATE COURTS.	County courts must furnish probate and magistrate courts adequate office and storage space, office furniture, equipment, appliances and supplies. County courts do not have authority to lease or permit the use of space in the county courthouse for private purposes.
20-51	Feb 28	DIRECTOR OF REVENUE. MOTOR VEHICLES. ATTORNEY GENERAL.	Director of Revenue may establish branch offices for administration of motor vehicle law, employ personnel and fix compensation. Employees to be paid out of state treasury. Motor vehicle owners, etc., shall pay only lawful fees for licenses. Gifts to employees for statutory services not favored by law. Attorney General cannot represent persons for recovery of excess license charges.

20-51	Mar 6	COURTS. INSANE PERSONS.	Jurisdiction of probate court to entertain insanity inquiry under Section 458.020, RSMo 1949, depends on residence in the county of the alleged insane person and not his mere presence there.
20-51	May 4	Mr. Wilkie Cunningham	WITHDRAWN
21-51	Apr 24	CRIMINAL PROCEDURE. CERTIFICATION AND RETURN OF FEE BILLS BY MAGISTRATE IN CERTAIN MISDEMEANOR CASES.	Under Section 550.240, RSMo 1949, trial magistrate in every misdemeanor case where county liable for costs, must make out complete fee bill and return same and all papers in case to circuit or criminal court clerk of county as promptly as circumstances permit.
22-51	Feb 26	RECORDER OF DEEDS.	When a chattel mortgage on a motor vehicle is recorded, the recorder of deeds should certify the fact on the certificate of title.
22-51	Aug 14	CIRCUIT CLERKS. DEPUTIES. THIRD CLASS COUNTIES.	(a) County Courts should continue to pay the salary of the duly elected, acting, and qualified circuit clerk, while clerk is in army; (b) County courts cannot deduct from the salary paid to a deputy circuit clerk; (c) County courts cannot deduct from the salary of the circuit clerk an increase in salary for a deputy, which increase was ordered by the circuit judge.
22-51	Dec 4	MAGISTRATE COURT JURORS.	A clerk of a magistrate court is required by law to issue a scrip to a magistrate court juror for his services. The county treasurer is required to pay such scrip out of any money in the treasury appropriated for county expenses as in the case of payment of county warrants.
24-51	Jan 10	OFFICERS. COURTS. MAGISTRATES. NOTARIES PUBLIC.	Probate judge and magistrate may also hold office of notary public, but is not entitled to receive compensation for any duties performed as notary public. Change in population of county changes salary of county officers effective January 1, 1951.
24-51	Apr 2	SURFACE WATER. ROADS AND BRIDGES.	A landowner may, by the erection of a dam or embankment, keep surface water off of his land, provided he exercises reasonable care and prudence in accomplishing that object.
24-51	Apr 16	MUNICIPAL CORPORATION. HOUSING AUTHORITY.	Agreement governing a general deposit of funds between a bank and housing authority is not invalidated because one of the commissioners is also an officer of the bank.
24-51	Apr 25	COUNTY COURTS. POWER TO BORROW MONEY AGAINST	County Courts of Class Two Counties may borrow against fiscal year's taxes and revenues; have the discretion to advertise for bids concerning proposed borrowings; Section 50.060, RSMo 1949, is only

		FISCAL YEAR'S TAXES AND REVENUE.	statute allowing such borrowings; Section 50.660, RSMo 1949, has no connection with or bearing upon Section 50.060, supra.
24-51	May 3	COUNTY BUDGET. COUNTY AUDIT. COUNTY COURT.	County Court of Buchanan County not authorized to order county audit if cost for same is not included in County Budget and no emergency exists necessitating the audit to be ordered.
24-51	May 29	PLUMBERS.	A person may be prosecuted for violation of a state law regulating plumbing even though he has obtained a permit to perform specific plumbing work under provisions of a city ordinance, if he violates such state law.
24-51	June 20	COUNTY COURT. COLLECTOR. BOND.	County Court of Buchanan County not authorized to budget and pay the premium on the County Collector's bond for period greater than the current year. Not authorized to bind subsequent courts by paying premiums a year or years in advance of the current year.
24-51	July 2	MAGISTRATE COURTS.	In a misdemeanor case pending before a magistrate court, the State, through the prosecuting attorney, is entitled to file a motion to disqualify the magistrate on the ground of prejudice against the State.
24-51	Sept 15	RECORDER OF DEEDS.	It is not mandatory that recorder of deeds file a bill of sale (1) when it has neither been acknowledged nor witnessed nor (2) when it has been witnessed but not acknowledged. It is mandatory that the recorder of deeds record a bill of sale which has been proved or acknowledged according to law.
24-51	Oct 25	DRAINAGE DISTRICTS, MAINTENANCE TAX.	A drainage district does not lose its authority to levy and collect a maintenance tax by reason of its failure to function for a period of years.
24-51	Oct 25	SOCIAL SECURITY. SCHOOLS. COUNTY SUPERINTENDENT OF SCHOOLS.	The clerical assistant to the county superintendent of public schools is an employee of the county and social security deductions and matching payments shall be made by the county when the county participates in social security under Senate Bill No. 3.
24-51	Oct 25	SOCIAL SECURITY. COUNTY FARM BUREAU.	The employees of the County Farm Bureau are not county employees under the provisions of Senate Bill No. 3, the County Farm Bureau being an instrumentality.
25-51	Apr 25	LABOR.	Employees of a nursing home or "rest haven" does not fall within Section 290.040, RSMo 1949, Hours of labor of female employees.
25-51	July 25	WOMEN. LABOR. INDUSTRIAL INSPECTION. HOURS OF WORK.	Nurses employed by manufacturing and mercantile establishments not within provisions of statute relating to maximum hours of work by women.

26-51	Feb 7	OATHS. ELECTIONS.	Notaries public, Commissioners of deeds, army officer above rank of lieutenant, naval officer above rank of ensign and Kansas City election officials are officers “authorized by law to administer oaths.
26-51	Sept 17	FOUR QUESTIONS: SALE OF CONVICT MADE GOODS, WARES AND MERCHANDISE.	Convicts cannot legally enter into contact with third persons, for the purchase of convict made goods, wares or merchandise, made on their own time, using their own materials, purchased with their own funds.
27-51	Mar 21	TAXATION. PROPERTY CLASSIFICATION.	Billboard annexes to land presumably under lease agreement between billboard owner and landowner, with right of removal ordinarily reserved in lessee at end of term, in absence of intention of parties to contrary; billboard does not become part of, or any interest in land, and for tax purposes under Sec. 137.010, RSMo 1949, should be classified as tangible personal property and not as real property. Corporation owned bill board to be assessed in county where billboard is situated under Sec. 137.095. If individually owned to be assessed in county of owner’s residence, under Sec. 137.090.
27-51	Mar 30	Hon. Clarence Evans	WITHDRAWN
27-51	Sept 6	STATE TAX COMMISSION.	The State Tax Commission is without authority to reassess real estate or to abate taxes on property which was duly assessed on January 1, 1951, and which, subsequent to that date, suffered a reduction in value due to floods in June and July of 1951.
30-51	Mar 22	CRIMINAL LAW.	The state may take depositions in criminal cases under Art. I, Section 18(b), Constitution 1945, when it is not necessary to pay traveling expenses of defendant and his counsel. State may not take same if it is necessary to pay said traveling expenses until the Legislature makes provisions therefor.
30-51	Nov 7	PROSECUTING ATTORNEYS. MAGISTRATE COURTS.	Prosecuting attorney entitled to five dollars upon conviction of a misdemeanor in magistrate court, which is to be assessed as costs against the defendant.
30-51	Nov 29	SCHOOLS.	Board of Regents of Northwest Missouri State College authorized to make settlement for damages incurred to college property and receive payment of money resulting from said settlement.
31-51	Apr 27	Hon. Robert H. Frost	WITHDRAWN
31-51	June 22	CIRCUIT CLERK. MILEAGE FEES.	County Court cannot legally pay Circuit Clerk mileage from the county seat, Carthage, Missouri to Joplin, Missouri, when he attends court being held at Joplin, Missouri.
32-51	Apr 5	COUNTY TREASURER.	County treasurer to turn over to state treasury or county revenue fund

		COST IN CRIMINAL CASES. FEES.	all uncalled for fees at the end of the next term of court following receipt of the criminal cost fee bills.
33-51	Mar 19	PUBLIC SERVICE COMMISSION. CERTIFICATE OF CONVENIENCE AND NECESSITY.	A certificate of convenience and necessity is prerequisite for one to operate as a motor carrier of passengers for hire; "taxicabs" operating within "suburban territory" exempt.
33-51	May 18	ADMINISTRATION. INHERITANCE TAX REFUNDS, PROCEDURE. STATUTE OF LIMITATIONS.	Arkansas Court judgment obtained by Missouri executor binding; court lacked jurisdiction of inheritance tax matters under Missouri statutes. Such jurisdiction in Probate Court of Livingston County, Mo., where administration was pending. Court could find erroneous tax payment under Sec. 145.150 but lacks power to order State Treasurer to make refund. Refunds to be certified by Director of Revenue under Sec. 145.250. Right to refund accrued when it was settled by probate court tax was erroneous. Statute of Limitations runs from such time.
33-51	Aug 7	PROSECUTING ATTORNEYS.	Prosecuting Attorneys may be reimbursed for actual and necessary traveling expenses in the investigation of crimes and the county court has authority to pay such expenses.
33-51	Aug 23	INHERITANCE TAXES. APPRAISERS.	No Missouri statutes require inheritance tax appraisers to accept inventory-appraisal as sole proof of value of estate property for tax purposes. He may subpoena witnesses, require production of books, records, documents, papers and all other available material evidence by which to ascertain value of such property and base appraisement thereon.
33-51	Oct 10	SHERIFFS. COUNTY COURT.	Sheriffs of class two counties are required to purchase supplies in accordance with Sections 50.760 to 50.790, inclusive, RSMo 1949.
33-51	Oct 19	COUNTIES. HOSPITALS.	Trustees operating county public hospital established under Section 205.160, RSMo 1949, authorized to anticipate special current tax levy for purpose of paying superintendent of hospital and county court in third and fourth class counties is required to issue warrants therefor on the county hospital fund.
33-51	Nov 27	SCHOOLS. TAXATION.	Where there has been a failure to extend on the regular tax book for the use of the county collector a school tax levy legally authorized the county clerk must prepare a supplemental tax book with said tax extended thereon so that the same may be collected.
35-51	Mar 14	COUNTY CLERKS.	County Clerks in third class counties may retain fees collected under Section 51.400, RSMo 1949, in addition to their salaries and do not have to account for same, but cannot retain fees collected under Section 51.410, RSMo 1949, which fees are to be accounted for and

			paid over forthwith to the County Treasury.
35-51	Aug 8	SENATE BILL NO. 38.	Senate Bill No. 38 of the 66th General Assembly of Missouri shall take effect and be in force on and after the 9th day of October, 1951.
35-51	Oct 8	CORONERS.	Witnesses appearing at coroner's inquest entitled to be aided by counsel but witnesses and their counsel not authorized to cross examine other witnesses.
35-51	Oct 26	Hon. Philip A. Grimes	WITHDRAWN
35-51	Nov. 19	Hon. Philip A. Grimes	WITHDRAWN
37-51	Jan 29	COUNTY TREASURERS.	The office of city attorney in a third class city when the duties of that office are limited by city ordinance to the prosecution of cases in police court is not incompatible with the office of county treasurer in a third class county.
37-51	Feb 28	APPROPRIATIONS. STATE COUNCIL OF DEFENSE.	Appropriation to Council of Defense to be expended by council acting in a body in its official capacity. Division of Civil Defense cannot expend balance of appropriation to State Council of Defense.
37-51	Mar 12	Mr. Morran D. Harris	WITHDRAWN
37-51	Mar 16	COUNTY COURT. LICENSE.	County court in third class county has discretion to refuse to issue license to keepers of billiard tables.
37-51	Mar 22	CHANGE OF NAME. VITAL STATISTICS.	A court order changing the name of a father does not automatically change the name of his children and may not be accepted by the Bureau of Vital Statistics as sole basis for amending birth records of such children.
37-51	May 8	MOTOR VEHICLES. CERTIFICATE OF TITLE.	A person selling in Missouri, a motor vehicle not registered under the laws of this state, to which motor vehicle the seller passes to the buyer no evidences of title, does not violate sub-section 4 of Section 301.210, RSMo 1949.
37-51	May 15	BASTARDS. CHANGE OF NAME.	A court order changing the name of the mother of an illegitimate child in no way affects the surname of such child.
37-51	June 8	Hon. David E. Harrison	WITHDRAWN
37-51	June 15	Hon. C. D. Hamilton	WITHDRAWN
37-51	July 13	SCHOOLS. ELECTIONS.	In election to vote on forming enlarged school district County Board of Education may designate one or more voting places. Majority vote of members of board of directors of receiving school district is all that is required to complete annexation of an adjoining district wherein the

			voters have voted for said annexation.
37-51	July 30	LOTTERY.	Scheme whereby coupons are distributed by merchants with purchase, said coupons varying in prize value proportionally to the amount of purchase and drawing held with prizes awarded constitutes a lottery. Distribution of some free coupons without purchases does not make scheme any the less a lottery.
37-51	July 31	CIVIL DEFENSE.	State agency may enter into federal matching fund agreement on behalf of a local political subdivision.
37-51	Aug 7	APPOINTMENT OF ATTORNEY FOR COUNTY COURT DRAINAGE DISTRICT.	Duties of prosecuting attorney and of attorney for county court drainage district incompatible. Authority of county court to supervise and control county court drainage district is broad enough to permit it to terminate employment of attorney for drainage district appointed by preceding county court.
37-51	Sept 17	COUNTY TUBERCULOSIS HOSPITAL.	No responsibility accrues to the State of Missouri for the care of patients in a County Tuberculosis Hospital if such hospital is closed; such patients may be admitted to the Missouri State Sanatorium only upon a county order.
37-51	Oct 11	MOTOR VEHICLES. HIGHWAYS.	Trucks bearing advertising signs without the written permission of the State Highway Commission, and parked on the shoulder of a highway, do not violate Section 227.220, RSMo 1949.
37-51	Oct 22	HOTELS.	Each room in an apartment hotel is a guest room and should be counted separately for licensing purposes.
37-51	Nov 13	COUNTY HOSPITALS. DONATIONS.	A county may accept title to a building and to equipment which building and equipment provide "hospital and clinic facilities," said property to be operated by the board of trustees of the county hospital in that county and to be a part of said hospital.
39-51	Apr 12	SCHOOL DISTRICTS. ELECTIONS.	Proceedings as prescribed by statute for consolidation of school districts must be substantially complied with. Common school districts in annexation election cannot vote to annex to either one or the other of two consolidated districts at the same election.
39-51	July 18	MINORS.	The word "minor" used in Section 563.160, RSMo 1949, to receive definition set forth in Section 457.010, RSMo 1949. "Minor" is person under 21 years of age.
39-51	July 26	PUBLIC BUILDING.	Bus station is public building within meaning of Sections 320.070 and 320.080.
39-51	Sept 25	SCHOOLS. CONSTITUTIONAL LAW.	Under Section 23, Article VI of the Constitution, a school district cannot make a personal loan to a private individual.

39-51	Oct 4	MAGISTRATE COURT JURORS.	The compensation of magistrate court jurors is fixed by Section 499.090 and 499.100, RSMo 1949, and this compensation fixed by said sections is to be paid in both civil and misdemeanor cases.
40-51	Feb 5	MUNICIPAL CORPORATIONS. CONSTITUTIONAL LAW. ELECTIONS.	Under Article VIII, Section 5, Constitution of Missouri, registration of voters can only be provided by for state statutes, and not city ordinances.
40-51	Mar 6	MOTOR VEHICLE FUEL TAX. TAXATION.	Claimant of motor vehicle fuel tax refund must declare to the seller at time of purchase his intention to use motor fuel for purposes other than propelling of motor vehicles upon the public highways of this state and declare his intention to claim a refund of the tax paid as a part of the purchase price of the fuel. All applications for refunds under section 142.230, RSMo 1949, must be filed with the collector of revenue within 120 days of the date of purchase, as shown on the original invoice or sales slip.
40-51	Oct 10	COUNTY LIBRARY DISTRICT.	A library building and lot is owned by the county library district; library funds may be used to redecorate a building the library district rents.
41-51	Feb 7	INTOXICATING LIQUOR.	Missouri law does not prohibit the sale of intoxicants to persons who have formally been adjudged to be mentally incompetent.
41-51	May 17	BOARD OF POLICE COMMISSIONERS (ST. LOUIS).	Under the Missouri Statutes the St. Louis Board of Police Commissioners may employ policewomen with the same duties, powers and privileges as policemen.
41-51	June 12	TAXES OF SERVICE MEN.	A member of the armed forces stationed in Missouri, but maintains residence elsewhere, is not subject to the payment of a tax on personal property in this state.
41-51	June 13	MERCHANTS' TAX.	The county collector is authorized to institute suit and prosecute the same against a merchant who fails to file the statement required in Section 150.050, RSMo 1949.
41-51	July 20	Hon. W. H. Holmes	WITHDRAWN
41-51	Aug 7	BONDS. SCHOOL DISTRICTS.	Bonds issued by Frankford School District for payment of general expenses of the school district are eligible for registration.
41-51	Aug 28	SOCIAL SECURITY. COUNTY BUDGET LAW.	County contribution imposed by Senate Bill No. 3 is included in the 1951 budget and is payable from class 4.
41-51	Oct 2	COUNTY TREASURERS. INTANGIBLE TAX	Intangible tax forms must be furnished by the State Director of Revenue to all county treasurers in third and fourth class counties in this state.

		FORMS.	
41-51	Nov 5	BOND ELECTIONS.	It is not necessary that the name of the county and state be included in the notice of the place of a special bond election if the notice names a locally well-known place for holding such election.
41-51	Nov 21	REAL ESTATE BROKERAGE BUSINESS LICENSE. NONLICENSED COPARTNER MAY BE IN SUCH BUSINESS. COPARTNER MAY SHARE IN PROFITS OF BUSINESS.	Copartnership real estate brokerage business may be licensed when one of the copartners does not hold real estate broker's license. Where he does not actively participate in such business, such copartner may share in profits of such business.
42-51	Mar 13	ROADS AND BRIDGES. MANDAMUS NOT PROPER REMEDY TO COMPEL RECONSTRUCTION OF BRIDGES, WHEN.	Where bridges adjudged sufficient and become part of road system of the county under Sec. 242.350 RSMo 1949, are subsequently destroyed, authority having charge of bridges cannot be compelled by mandamus to reconstruct bridges, since such authority is allowed discretion under this section.
42-51	Mar 19	Members of the House of Representatives	WITHDRAWN
42-51	June 6	CONSTITUTIONAL LAW.	The legislature may authorize a county court to increase the tax levy for hospital purposes without a two-thirds vote of the people as provided by Section 11(c), Article X, Constitution of Missouri.
42-51	Oct 9	PUBLIC ADMINISTRATORS. PROBATE COURT.	Public Administrator, upon re-election, must furnish new bond to qualify. Bond of prior term remains in force and effect until new bond is furnished.
43-51	Jan 31	ABSENTEE BALLOTS.	An absentee ballot may be cast in a school reorganization election. It is the duty of the County Board of Education to supply ballots in a school reorganization election.
43-51	Jan 31	BONDS. OFFICERS. CIRCUIT CLERKS. RECORDER OF DEEDS.	In counties of fourth class circuit clerk an ex officio recorder of deeds must give two separate and distinct bonds and cannot give one bond conditioned upon the faithful performance of his duties in both offices.
43-51	Feb 2	OFFICERS. RECORDER OF DEEDS. FEES AND SALARIES.	Recorder of deeds can refuse to record instrument until recording fee is paid.
45-51	Apr 12	PUBLIC HEALTH AND	Director of Department of Public Health and Welfare may convey land

		WELFARE. STATE HIGHWAY DEPARTMENT.	of said department to State Highway Department for right-of-way purposes.
46-51	Jan 22	COUNTY ASSESSOR. COUNTY CLERK. ASSESSOR.	County Clerk may permit assessor to hire stenographic help in fourth class county; County Court not authorized to pay compensation for deputy assessor or clerical hire. County Clerk not authorized to alter assessor's books on his own initiative when assessor certified his books to the county court.
46-51	Sept 25	COUNTY BOARD OF EDUCATION EMPLOYMENT OF ATTORNEY.	County board of education has no authority to employ attorney to advise board with reference to preparation and submission to voters of plan for reorganization of school districts.
48-51	July 17	COUNTY COURTS. TOWNSHIP ORGANIZATION. SPECIAL ROAD DISTRICTS.	The county court may in its discretion allow or deny petition for incorporation of special road district in county under township organization. County court's exercise of discretion is exercise of legislative instead of judicial power. Not necessary to divide entire county into special road districts. Special road district entitled to receive only those tools and machinery regularly used heretofore in maintaining roads now in the district.
49-51	Jan 4	PROSECUTING ATTORNEYS. FEES. CHANGE OF VENUE.	Prosecuting attorney of county from which change of venue is taken should be remitted conviction fee.
49-51	Jan 30	PUBLIC FUNDS.	A custodian of public funds is liable as an insurer for any loss thereof.
49-51	Feb 1	SCHOOLS.	Reorganization plan submitted by Greene County Board of Education and approved by the State Board of Education to combine Ritter and Springfield School Districts is valid.
49-51	May 18	MOTOR CARRIERS.	A motor carrier, using the public highways for the purpose of transporting automobiles in interstate commerce under permit from the Public Service Commission, is not permitted to haul farm products over the public roads of the state without obtaining a permit for that purpose also.
49-51	Sept 10	MERCHANTS' TAX AND LICENSE.	A merchant doing business in more than one county must obtain a license and pay an ad valorem tax in each county.
49-51	Nov 23	COUNTY COLLECTOR. TAX LIEN.	Realty may not be held for taxes on improvements separate from the realty and so assessed.
49-51	Nov 28	REVENUE LAWS. MAGISTRATE COURTS.	Suits to collect taxes, which suits are based upon revenue laws of this state, may be heard and determined in magistrate court if the meaning, validity and application of such law or laws is not an issue in

			the case, so long as the total amount sued for does not exceed the jurisdiction of the magistrate court.
51-51	Mar 15	Hon. James G. Lauderdale	WITHDRAWN
51-51	May 22	SENATORIAL REDISTRICTING COMMISSION.	The commission must file its report not later than July 19, 1951.
52-51	Apr 2	INSURANCE.	Section 379.255 and Section 379.080, RSMo 1949 to be read together. Mutual and stock companies comprehended in said sections are permitted to invest assets in loans secured by real estate or personal property as collateral, after first investing in prime securities named in Section 379.080, RSMo 1949, in an amount required to meet paid-up capital in stock companies.
52-51	Nov 14	Hon. C. Lawrence Leggett	WITHDRAWN
54-51	Mar 12	SOIL CONSERVATION DISTRICTS.	Each elected member of the Board of Supervisors for each Soil Conservation District must be Elected for a term of two years.
54-51	Apr 26	MOTOR VEHICLES. HIGHWAY PATROL.	Trailers not subject to staggered registration provisions, nor subject to penalty fee for delinquent registration. Registration fee of \$3.00 cannot be prorated.
54-51	Nov 26	OFFICER. MUNICIPALITIES.	Marshal of city of third class may be removed under Section 77.340, RSMo 1949, even in absence of ordinance.
57-51	Nov 15	DEPUTY SHERIFF. DEPUTY CIRCUIT CLERKS. COUNTY BUDGET LAW.	(1) A circuit judge has the power, at any time, to make an order increasing the salary of a deputy sheriff and/or a deputy circuit clerk; (2) A county court is obligated to pay salary increases of deputy sheriffs and/or deputy circuit clerks ordered by a circuit judge; (3) A county court is obligated to issue warrants covering such salary increases even though there is not money immediately available for such purpose; (4) Warrants issued to deputy sheriffs and/or deputy circuit clerks will be protested if there are no funds available with which to pay them; (5) A county court would not be justified in refusing to pay a salary increase ordered by a circuit judge; (6) A circuit judge may not make an order for a salary increase of a deputy circuit clerk which is retroactive.
58-51	July 11	TAXATION. INTANGIBLE PERSONAL PROPERTY.	Postal Savings accounts not obligations of United States; not exempt from state taxation under Section 742, Title 31, U. S. C. A. Ownership or beneficial interest of such an account taxable as intangible personal property, classified as "money on deposit," and tax to be measured by yield or income of account under Section 146.010, RSMo 1949.

59-51	Mar 8	CORONERS.	The compensation of coroners in second class counties is confined exclusively to the annual salary of \$2,000.00 fixed by Section 58.090, RSMo 1949.
59-51	June 22	SHERIFFS. MOTOR VEHICLES.	Motor vehicles owned by the sheriff of a second class county and used by him and his deputies exclusively in the transaction of his official duties, should be assessed against him personally, after which he is personally liable for the taxes thereon.
59-51	Oct 8	WITNESSES. COMPLAINT. PRELIMINARY EXAMINATION.	The names of witnesses need not be endorsed upon the complaint used as the basis of a preliminary examination in a felony case.
59-51	Oct 9	TAXATION. DELINQUENT TAX BILLS.	The penalty on a delinquent tax bill is due and payable without previous notice to the taxpayer and begins to run on the first day of January.
59-51	Oct 18	COUNTY. PAUPER.	Sole responsibility of the county to support poor inhabitants of said county. County cannot legally require such persons to turn over small pension or retirement grants.
59-51	Oct 31	LIVESTOCK. UNFENCED LAND. OPEN RANGE TERRITORY.	United States of America not required to fence wild life refuge located in open range territory to keep ranging cattle from ranging or grazing within the boundaries of the refuge.
60-51	June 29	Dr. C. W. Meinershagen	WITHDRAWN
62-51	Sept 17	COUNTY ASSESSOR.	A county assessor who has failed to make a real property list within the time and manner prescribed by law cannot subsequently make such a list and receive compensation therefor.
63-51	Feb 6	INHERITANCE TAX. PROSECUTING ATTORNEY.	Prosecuting Attorney not qualified to act as appraiser in fixing state inheritance taxes.
63-51	Feb 28	MUNICIPAL AIRPORTS.	If the State of Missouri acquires the Jefferson City Memorial Airport under the provision of the proposed law the State will take the property subject to the existing ninety-nine year lease.
63-51	Mar 1	COUNTY OFFICERS. PAYMENT OF FEES TO. WHEN.	County clerk of third class county entitled to fees for tax extensions in 1947-48; may subsequently request payment of county's part; fees are fixed by legislature and are automatically in budget by operation of law. Fees may be paid in subsequent years from available funds of county though item not actually included in budget for year in which payment is to be made.

63-51	May 10	SCHOOLS.	Two vacancies in a city, town, consolidated, or reorganized school district shall be filled by appointment by the county superintendent of schools; two vacancies in a county school board shall be filled by the remaining members.
63-51	July 25	SHERIFFS. COUNTY COURT.	County Court authorized to pay sheriff mileage expense incurred in criminal case at the end of each month.
63-51	Sept 6	JAIL BREAKING. CITY ORDINANCE.	A city ordinance is not a penal statute, and, therefore, a person may not be tried for violating Section 557.390, RSMo 1949, when he escapes after being arrested by the city police and lodged in the city jail for a violation of a city ordinance.
63-51	Sept 20	MOTOR VEHICLES. LICENSES. MISDEMEANORS. REGISTRATION. CRIMINAL LAW.	When person operating motor vehicle on the highways of the state makes a delinquent registration, he is subject to penalty fee of \$2.00 and is also guilty of misdemeanor under Section 301.440, RSMo 1949.
63-51	Dec 10	INTOXICATING LIQUOR.	Section 311.290, RSMo 1949, does not prohibit the sale of intoxicating liquors on election days concerning the Production and Marketing Administration.
64-51	Feb 19	COUNTY OFFICERS.	The compensation of a county officer cannot be increased during his term of office.
64-51	Mar 22	INHERITANCE TAXES. EXPENDITURES FOR LEGAL SERVICES A DEDUCTION AGAINST, WHEN.	Under Sec. 465.100 RSMo 1949, reasonable value of necessary legal services furnished to the administrator to be allowed; are administration expenses and deductible against inheritance taxes. Also reasonable value of services of additional attorneys secured by heirs to assist administrator's attorney where such services were necessary and beneficial to estate to be allowed and paid from estate funds; are administration expenses, and deductible against inheritance taxes.
64-51	May 16	SCHOOL DISTRICTS. ANNEXATION.	Portion of a consolidated school district may be annexed to another district after a vote of the voters of the whole of the district sought to be annexed favoring the release of the portion sought to be annexed and after acceptance by the school board of the proposed annexed district.
65-51	Feb 23	HOSPITALS. COUNTY MEMORIAL. HEALTH.	In order to qualify for State financial aid a County Memorial Hospital must be operated by the county and an amount equivalent to the sum of money sought in aid must be expended.
65-51	Mar 19	Mr. Charles E. Murrell, Jr.	WITHDRAWN
65-51	May 4	SCHOOLS.	Action in mandamus is proper procedure to enforce payment of a judgment obtained against a school district.

65-51	Nov 19	COUNTY ROAD. REPAIR A "USE" OF ROAD.	Repair of county roads is "use" under Sec. 392.080, RSMo 1949, authorizing construction and maintenance of telephone and telegraph lines along public roads in such manner as not to incommode the public in the use of such roads. Telephone wires preventing grading of shoulders may be obstructions as much as if placed in traveled portion of roads and may incommode public in use of roads. May be public nuisances, and enjoined as such.
66-51	Mar 13	LIABILITY. BAIL BONDS.	Sureties on bail bond conditioned for the appearance of defendant in court in a criminal proceeding at a given time are discharged from the obligations of the bond because of the fact that principal is confined in the State Penitentiary of Missouri, having been prosecuted and convicted of a second and different offense before date for appearance in accordance with provisions of the bond.
67-51	Feb 1	LABOR.	Federal Fair Labor Standards Act of 1938 does not apply to workers employed by a county.
67-51	Apr 26	SCHOOLS.	Teacher cannot serve as secretary of consolidated school district.
67-51	June 29	LOTTERIES.	A newspaper subscription contest, containing the elements of consideration, chance, and prize, is a lottery.
67-51	Oct 3	SHERIFF, MILEAGE.	The sheriff is entitled to mileage at the rate of ten cents per mile for taking a patient to a state hospital.
67-51	Oct 16	COUNTY BUDGET. DEPUTY SHERIFFS.	County court cannot pay salaries of deputy sheriffs out of class two funds of county budget.
68-51	Jan 25	ELECTIONS.	Parolees under Section 549.170, R.S. Mo. 1949, and persons discharged by certificate under Section 217.370, R.S. Mo. 1949, entitled to vote in Missouri.
68-51	Oct 23	CONSERVATION COMMISSION. FISH AND GAME. CRIMINAL LAW.	Anyone operating a devise consisting of gas motor operating a generator producing electric current connected to submerged wires injuring or killing fish is not subject to prosecution under Section 252.220, RSMo 1949.
68-51	Nov 27	COUNTY ASSESSOR. CLERICAL HELP.	The county assessor under House Bill No. 70, 66th General Assembly, is authorized to expend for clerical help as much as six hundred dollars (\$600.00) during the calendar year of 1951.
69-51	Jan 2	SCHOOLS.	Person who has contracted to transport school children to and from school not excused from supplying said transportation due to bad weather conditions.
69-51	Mar 20	PROSECUTING ATTORNEY. INTERMEDIATE	Must comply with section 217.170 requiring certain information be furnished superintendent of intermediate reformatory regarding prisoner delivered for confinement therein.

		REFORMATORY.	
70-51	Jan 11	SENATE. LEGISLATURE. ELECTIONS. COMPTROLLER. COMPENSATION.	When Senator-elect has been seated by State Senate, he is entitled to salary of such office.
71-51	Apr 3	CONSTITUTIONAL LAW. MEDIATION, BOARD OF COMPTROLLER. ATTORNEY GENERAL.	When Attorney General holds an act unconstitutional, the salary and expenses of officers acting thereunder should not be paid after the date the opinion is issued.
71-51	May 7	SCHOOLS.	Oral promise made by two of three member school board to pay bonus to teachers invalid and unenforceable.
71-51	June 16	CRIMINAL COSTS. MUNICIPALITY.	City of St. Louis entitled to be reimbursed by the state the actual cost for board of prisoners in the city jail pending trial for certain offenses.
71-51	July 5	SOCIAL SECURITY. STATE AGENCY.	The state agency has no authority under Senate Bill No. 3 to exclude from coverage services of an emergency nature.
71-51	Sept 10	SALES TAX. TAXATION.	It is not necessary for public schools supported solely by public funds to charge a sales tax to persons purchasing tickets of admission to school sponsored athletic events, plays and entertainments.
71-51	Sept 11	SOCIAL SECURITY. UNIVERSITY EMPLOYEES.	Employees of State Universities are employees of the State and the State Comptroller as state agency under SCSSB No. 3, is authorized to accept social security contributions from funds held by State Universities under provisions of Section 33.080, RSMo 1949, for university employees paid from those funds.
71-51	Oct 10	SOCIAL SECURITY. OFFICIAL COURT REPORTERS.	A circuit court reporter is an employee of each of the counties comprising his circuit and in the event the county has accepted the social security law it shall pay social security deductions upon the amount it pays the reporter.
71-51	Nov 20	SOCIAL SECURITY. OFFICIAL COURT REPORTER.	The County Treasurer should deduct social security contributions when he pays the official court reporter.
71-51	Nov 27	JUDICIARY. RETIREMENT COMPENSATION OF JUDGES & COMMISSIONERS.	Retirement compensation of judges and commissioners in accordance with House Bill No. 118, 66th General Assembly, should be computed as one-third of salary provided for by law at the present time or at any future time.
71-51	Dec 20	MOTOR VEHICLES.	Amateur radio operators applying for license plates containing call

		RADIO OPERATORS.	letters need only pay \$1.00 fee and are not required to repay regular license fee.
72-51	Mar 28	LIBRARIES.	City or town with tax-supported library becoming a part of county library district does not constitute newly established library so as to qualify for establishment grants.
72-51	Aug 3	LIBRARY TAX RATE.	After a merger of a municipal and a county library district, the tax rate in the municipality shall be the same as in the county.
73-51	Feb 1	MISSOURI STATE SCHOOLS. INSANITY HEARINGS.	Whenever an indigent inmate or patient at the Missouri State School becomes dangerously insane, the superintendent of said School may temporarily place such a patient in a state hospital for the insane. But the superintendent of said school shall immediately cause to be instituted proceedings in the probate court of the county where the school is located to have the court determine whether or not such patient is actually insane so that said patient may be detained by the state hospital for the insane until she is restored to sanity.
73-51	May 18	STATE CLAIMS.	An agency of the state having power to sue is also authorized to settle a claim in behalf of the state and execute a valid release of future liability.
73-51	May 23	INSANE PERSONS.	Insane persons discharged from state hospitals after having been found insane by a court of this state must be adjudged sane by a court of this state in order to have the right to vote and manage their affairs. Insane persons admitted to a state mental hospital on certification of two qualified physicians and discharged by the superintendent of said hospital have the right to vote and manage their affairs after their discharge by the superintendent.
74-51	Jan 25	Hon. Charles H. Rehm	WITHDRAWN
74-51	Apr 5	SCHOOLS.	Tuition payable to a consolidated high school district by common school district may be paid from either teachers' fund or incidental fund.
74-51	July 18	NARCOTICS. PROBATE COURT. VETERANS.	Probate court, upon adjudication of veterans as narcotic addict, may commit said veteran to United States Public Health Service for required care and treatment.
75-51	Mar 21	ABSENTEE BALLOTS.	An absentee ballot may be cast in the regular election held for the purpose of electing a county superintendent of schools.
75-51	Oct 15	Dr. Reuben R. Rhoades	WITHDRAWN
75-51	Nov 23	EXAMINATION. BOARD OF	(1) Applicant must be a graduate of a school or pharmacy to be eligible for registry by examination as a pharmacist in Missouri. (2) An

		PHARMACY. EXAMINATION FOR PHARMACIST. RECIPROCITY. ELIGIBILITY FOR REGISTRY BY RECIPROCITY.	applicant eligible for registry by reciprocity in Missouri if state from which he seeks reciprocity accords similar recognition to licentiates of this state. If he was registered or licensed by examination in such other state or foreign country; if the standard of competency in such other state or foreign country is not lower than that required in this state; and if the applicant for such license shall present satisfactory evidence of qualifications equal to those required from the licentiates in this state.
76-51	Sept 17	MAGISTRATE COURTS. SUMMONING JURORS.	The sheriff of a fourth-class county is under duty to summon jurors when ordered to do so by the magistrate.
76-51	Oct 5	Hon. Allen Rolston	WITHDRAWN
76-51	Oct 19	SPECIAL ELECTIONS. SECTION 262.500, RSMO 1949. DUTY OF COUNTY COURT.	County court required to file and consider petition requesting special election authorized by Section 262.500. Even though petition is signed by statutory number of qualified voters, court's duty is to refuse to call election if county has already reached maximum tax rate for county purposes fixed by Art. X, Sec. 11(b), Const. of 1945, and court is prohibited from calling the election under Section 262.500, supra.
78-51	Apr 19	TAXATION. MUNICIPALITIES.	Election to increase tax rate for purposes of increasing wages of police and fire departments is an election to increase rate for general municipal purposes and not for public health purposes. Constitutional limitations of 2/3 majority and four-year increase limitations therefor applies.
78-51	Dec 11	SHERIFF. WARRANT.	It is unlawful for the city policeman to make an arrest outside of the territorial limits of the city or state under a warrant directed to the sheriff.
79-51	Mar 30	PENAL BONDS.	Personal property, as well as real estate, may be used to qualify a surety on a bail bond.
81-51	Jan 16	Hon. H. G. Shaffner	WITHDRAWN
81-51	Jan 19	Hon. H. G. Shaffner	WITHDRAWN
81-51	Jan 25	OFFICERS. COUNTY COURTS.	Judge of county court holds over until successor is elected and qualified; no vacancy exists because judge-elect fails to qualify on account of illness; may qualify within reasonable time after physically able to perform duties.
81-51	Jan 26	Hon. H. G. Shaffner	WITHDRAWN
81-51	Feb 21	BANKS.	A condition precedent to a national bank becoming a state bank is that it shall dissolve under the laws of the United States and proceed in

			accordance with provisions of Section 362.235, RSMo. 1949.
81-51	Feb 26	FARM TO MARKET ROADS.	In the construction of a farm-to-market road the county court does not have discretion as to whether or not the road shall be built; neither the state nor county is liable for the cost of condemnation proceedings; where a farm-to-market road extends over road which has been maintained by a special road district, the special road district is not obligated to pay the expenses of condemnation and survey.
81-51	Feb 27	BANKS.	Bank records required to be preserved under Section 362.410, RSMo 1949, may be preserved by the methods prescribed in Section 109.120, RSMo 1949.
81-51	Mar 20	ELEEMOSYNARY INSTITUTIONS. STATE SANITARIUM.	The county of residence of a poor person in this state is the county from which such a poor person may be sent to the state sanitarium.
81-51	Mar 28	COUNTY COLLECTORS, SECOND CLASS COUNTIES.	The county court in second class counties may require a county collector to make bond in a sum equal to the largest collections made in any one month of the preceding year, plus ten percent of such sum, up to but not to exceed the sum of \$750,000. If the county court in second class counties requires the county collector to make daily deposits of all monies received by him on those days when such collections total as much as \$100.00, they may then permit him to make bond in a sum equal to only one-fourth of the largest amount collected during any one month of the preceding year, plus ten percent of such amount, up to but not to exceed the sum of \$750,000.
81-51	Apr 9	TRAINING SCHOOLS. EDUCATION. SCHOOLS.	Sec. 163.090 RSMo 1949 relating to re-employment of teachers not applicable to employees of training schools.
81-51	May 17	CONSUMER CREDIT LOANS.	Lenders securing certificates of registration to conduct consumer credit loan business under Senate Bill No. 78, 66th General Assembly of Missouri, required to procure such registration certificates from and after June 7, 1951.
81-51	Aug 7	Hon. H. G. Shaffner	WITHDRAWN
81-51	Sept 24	INHERITANCE TAXES. PAYMENT. PROCEDURE ON LEGATEE'S DEATH.	In determining amount of inheritance taxes on C's inheritance from B's estate, value of B's interest in A's estate when paid to B's administrator will become part of assets of B's estates.
81-51	Sept 28	HOUSE BILL NO. 70.	House Bill No. 70 of the 66th General Assembly of Missouri will take effect and be in force on and after the 9th day of October, 1951.
81-51	Nov 21	ELECTIONS.	Election to supply vacancy of state representative subject to general election laws. Appointment of but two judges in each precinct not

			authorized.
81-51	Nov 21	SOLDIERS' BONUS. BOARD OF REVIEW.	Claims for soldiers' bonus which have been filed and rejected may be refiled, reconsidered, allowed and paid if previous rejection is erroneous – including claims passed on and rejected by Board of Review.
82-51	Mar 21	INTOXICATING LIQUOR.	Supervisor of Liquor Control authorized to issue five per cent beer permit for premises located within 300 feet of a building not being used regularly as a place of religious worship.
83-51	Feb 5	ELECTIONS. CONGRESSMEN.	Vacancy in Congress filled by special election called by Governor.
83-51	Mar 21	NEGLECTED CHILDREN. COUNTY LIABILITY FOR SUPPORT. DIVISION OF WELFARE.	County in which "neglected child" is so declared by court liable for support if child has not been committed to guardianship. Division of Welfare may assist county with child welfare funds.
83-51	June 6	STATE COUNCIL OF DEFENSE. CONSTITUTIONAL LAW.	State of Missouri may not advance money to federal government to use in payment of defense supplies to be purchased by federal government, but state may reimburse federal government if appropriate legislation is enacted.
83-51	June 29	CONSTITUTIONAL LAW. STATUTES.	House Bills No. 29 and 398 are constitutional as their titles are valid.
83-51	Aug 16	CONSTITUTIONAL LAW.	House Committee Substitute for House Bills Nos. 13 and 39 is not unconstitutional nor in conflict with the extradition laws.
83-51	Aug 24	FEDERAL GRANTS. FLOOD RELIEF. DISASTER RELIEF.	Money received by Governor or his representative should be paid by Governor or his representative directly to political subdivisions of state to reimburse such subdivisions for expenditures as a result of flood.
83-51	Sept 12	ASSESSMENT LISTS.	A separate list, including all real and tangible personal property, must be made for each taxpayer. The assessor has no authority to make a joint list for husband and wife. Assessor cannot fill out list unless taxpayer has been given opportunity to do so.
83-51	Oct 2	SECURITIES. BLUE SKY LAW.	Sale of burial contracts providing for payment on the installment plan does not constitute a sale of a security under Missouri Blue-Sky Law.
83-51	Nov 16	MARRIAGE, FOREIGN COUNTRIES.	A marriage between first cousins legally performed in Italy would be valid in Missouri.
83-51	Nov 27	COUNTY ASSESSOR. COUNTY JUDGES.	An assessor in a county whose population is less than forty thousand need not consolidate all lands owned by one person in a square or

			block into one tract, lot or call; a county judge in a county of the third class must actually be present and attend court to be compensated therefor.
84-51	Jan 5	SCHOOLS. ARMORIES.	Board of directors of city, town or consolidated school district cannot deed tract of land to the state for armory purposes without consideration, as board only has authority to “advertise, sell and convey” same.
84-51	Feb 26	CONSERVATION COMMISSION. FISH AND GAME. WATERS.	Construction of Regulation 20, Wild Life Code of Missouri, 1951.
84-51	Feb 28	OFFICERS.	A public administrator in a county of the third class may also serve as deputy to county collector.
84-51	Apr 11	Township assessors.	The county court, as such, has no power of supervision over the township assessors in counties under township organization. But the county board of equalization has ample authority to adjust the assessments to meet the standards of true value.
84-51	July 21	Hon. Marion Spicer	WITHDRAWN
85-51	Mar 26	AGRICULTURE. DAIRY PRODUCTS.	A regulation requiring vehicles transporting milk to be covered and insulated is not compatible with paragraph 3 of Section 196.585, RSMo 1949.
85-51	Oct 8	MAGISTRATE COURT. HABEAS CORPUS.	Application for a writ of habeas corpus should not be made to a magistrate court when a circuit judge is available, and that application for such a writ to a magistrate court must state that no circuit judge is available.
86-51	Aug 28	SOCIAL SECURITY. OFFICIAL COURT REPORTER.	A circuit court reporter for the purpose of the Social Security Law is an employee of the county or counties from whom he derives his compensation.
88-51	Jan 27	PROBATE JUDGE. SALARY.	The estate of a Probate Judge who dies in office is not entitled to compensation as salary incident to such office between the date of the death of such Judge and the date of the appointment of a successor to him. Neither is the newly appointed Judge entitled to compensation between the date of the death of the previous Judge and the date of his appointment. Any balance of such salary unused constituting a part of excess fees collected by the Probate Judge should be paid into the school fund of such county.
88-51	Feb 5	VOCATIONAL REHABILITATION. INSURANCE.	A person receiving vocational rehabilitation training, having in his custody property owned by the state of Missouri has an insurable interest in such property. The proceeds of such policy may be made

			payable either to the State Treasurer for the State of Missouri or to the State Board of Education. Disbursement of the proceeds payable by the insurer depends upon who is named beneficiary.
88-51	Mar 6	Hon. H. Tiffin Teters	WITHDRAWN
88-51	Apr 20	LEGISLATURE. CONSTITUTION.	House Bill No. 72, as perfected by the 66th General Assembly, is constitutional.
88-51	May 11	Hon. O. C. Tee	WITHDRAWN
88-51	Sept 27	SHERIFFS SALARIES, 3RD CLASS COUNTIES. SHERIFFS EXPENSE IN SERVING CRIMINAL PROCESS.	Salary of sheriffs in 3rd class counties is determined by 1950 decennial census. County Court should allow sheriffs of 3rd class counties expense for gasoline actually used in serving criminal process.
89-51	Jan 3	NEW PATENT ISSUED FOR PURPOSE OF CORRECTING ERRONEOUS DESCRIPTION IN ORIGINAL PATENT.	Secretary of State may issue corrected patent for land in cases in which land was erroneously described in original patent from state after proper showing is made.
89-51	Jan 8	LEGISLATURE.	Number of Representatives in Legislature from respective counties determined on basis of final census figures.
89-51	Feb 10	CRIMINAL LAW.	Provisions of R.S.Mo. 1879, requiring justices of the peace to certify criminal cases occurring in Galena and Joplin townships, Jasper County, Missouri, be certified to the Joplin division of the Circuit Court, repealed.
89-51	Feb 27	MOTOR VEHICLE FUEL TAX.	County not entitled to a refund of motor vehicle fuel tax by virtue of being a subdivision of the State. County entitled to refund of motor vehicle fuel tax if fuel is not used to operate a motor vehicle over a public road as such terms are defined by the taxing statute.
89-51	Mar 22	COUNTY COURT. AUTHORITY TO APPOINT GENERAL SUPERINTENDENT OF HIGHWAY DEPARTMENT.	There is no statute authorizing county court to create the office of "General Superintendent" of County Highways.
89-51	May 7	CORRECTED PATENTS TO STATE LANDS.	Secretary of State cannot issue corrected patents to any person or persons other than the original patentee or some person or persons who own the entire tract intended to have been described in the original patent.

89-51	May 8	COUNTY COURTS. MILEAGE.	County Court Judges in counties of the third class shall receive 5¢ per mile for each mile necessarily traveled in going to and returning from the place of holding county court, and no other mileage.
89-51	June 6	NEW PATENT TO STATE LAND UNDER SECTION 446.180, RSMO 1949.	Documents submitted constitute sufficient evidence to warrant issuance of patent.0000
89-51	July 25	SOCIAL SECURITY. PROBATE COURT. CITY OF ST. LOUIS.	Probate judge and employees of probate court, City of St. Louis, are under the political subdivision of the City of St. Louis under the provisions of S.C.S.B. No. 3 and may be incorporated in any agreement between the state agency and City.
89-51	Oct 16	CORONER. CITY OF ST. LOUIS.	The Coroner of the City of St. Louis can succeed himself.
89-51	Oct 16	COUNTY COURT. COUNTY HOSPITAL.	The county court has no authority to approve or disapprove vouchers of the hospital board under Section 205.190, RSMo 1949; county assessor must give a surety company bond.
89-51	Oct 19	SOCIAL SECURITY.	The Kansas City Board of Election Commissioners, members of the Board of Election Commissioners, and its employees for the purpose of Senate Bill No. 3, 66th General Assembly, are covered by agreements entered into between the city of Kansas City and the state agency; the county of Jackson and the state agency; the county of Clay and the state agency, extending the benefits of Federal Old-Age and Survivors insurance to their employees.
90-51	May 1	STATE MERIT SYSTEM ACT.	The State Merit System Act prohibits a person employed under this act from becoming a candidate for election to the office of member of a local school board.
90-51	May 16	TOWNSHIP FUNDS.	Township Board has authority to use Township funds in payment of damages for condemned right of way to be used for road construction being done under provisions of the King Road Bill (Sections 231.440 to 231.500, RSMo 1949.)
90-51	July 27	RECORDER OF DEEDS. LEASE.	Lease is instrument in writing affecting real estate as set out in Section 59.360 RSMo 1949. Recorder of Deeds not authorized to permit either party to a lease to alter the same after it has been delivered to the recorder for recording.
90-51	Oct 25	MERIT SYSTEM. NOTICE.	1. Notice of dismissal must be dated at least prior to the effective date of the dismissal. 2. Reason for dismissal must be sufficiently explicit that employee is able to explain and defend charges.
92-51	Feb 14	LEGISLATORS.	Members of the General Assembly may not be appointed Assistants

		ASSISTANT PROSECUTING ATTORNEY.	Prosecuting Attorney in counties of the fourth class in this State during the term for which they are elected to the General Assembly.
92-51	June 25	INTOXICATING ALCOHOLIC LIQUORS.	A city council is charged with the duty of determining whether a petition calling for an election to decide whether intoxicating liquor shall be sold by the drink, bears a number of names representing one-fifth of the qualified voters in such city, but the city council is not bound to follow any particular method in reaching such a determination.
92-51	Nov 14	Mr. Earl L. Veatch	WITHDRAWN
93-51	Jan 22	TAXATION. HEALTH CENTERS. COUNTY TREASURER.	Taxes collected for County Health Centers paid into county treasury.
93-51	Feb 9	PROSECUTING ATTORNEY'S FEES.	In criminal cases prosecuting attorney's fee shall not be charged as costs unless conviction be obtained.
93-51	Mar 17	Hon. Stanley Wallach	WITHDRAWN
93-51	Apr 24	RECORDS, BOUND.	Record sheets assembled in a loose-leaf binder equipped with a locking device would be considered to be a "bound" record.
95-51	Jan 18	TOWNSHIP COLLECTOR. COMMISSIONS.	A township collector shall receive a commission of 2 ½% on the first \$40,000 collected during the year or annual term of his office prior to his final settlement in March of each year, and 1% on the next \$40,000 collected, and ¾ of 1% on the remainder and that the period of time during which said collections are made is not affected by the fact that the collections may have been made in two different calendar years.
95-51	Jan 23	Hon. S. F. Wier	WITHDRAWN
95-51	Jan 31	TUITION. SCHOOLS.	Discretionary with board of directors of school district whether or not nonresident pupils shall be admitted. Board of directors of school district may prescribe tuition for nonresident pupils and refuse admission if tuition is not paid.
96-51	Feb 15	SCHOOLS. STATE AID.	Under Public Law 815 – 81st Congress – State Board of Education is proper state agency to carry out purposes of the act and direct investment of moneys received and paid by the Federal government to the State Treasurer.
96-51	Mar 8	CONSTITUTIONAL LAW. SCHOOLS. TAXATION. ELECTIONS.	Section 11, Article X of the Constitution as amended, provides two methods of increasing school tax levy above constitutional limit. Information to be on ballots used in elections for tax levy increase should include rate, purpose and period of levy.

96-51	Apr 2	PUBLIC SCHOOLS.	When there is an equal division of the Board of Education of a school district on any question pending before the Board the provisions of Sec. 165.320, RSMo 1949 are mandatory that the County Superintendent of Schools cast the deciding vote on such question; the provisions of said Sec. 165.320 are not directory; and, that the provisions of Sec. 163.090, RSMo 1949 do not exempt the said Superintendent from being a member of the Board to cast the deciding vote upon the question of notifying teachers of their re-employment or the lack thereof.
96-51	Apr 26	BOND REQUIRED OF COUNTY SUPERINTENDENT.	A county superintendent must give bond in double the amount of his annual salary.
97-51	Jan 19	MOTOR VEHICLES.	Criminal prosecution must be instituted within the jurisdiction in which the crime occurred. A person may be prosecuted for making false answers in an affidavit.
97-51	Jan 31	COUNTY COURTS. SHERIFFS. COUNTY FARM BUREAU.	Amount of appropriation for support of county farm organization lies within the county court's discretion. Fixing of deputy sheriff's salary lies within discretion of circuit judge; county court without authority in this regard.
97-51	June 21	COUNTY LIBRARY DISTRICT. LIBRARY DISTRICT.	Board of Trustees of County Library District authorized under Section 182.070 to purchase real property for use of the library with funds collected from the tax levied under Section 182.010.
97-51	Oct 15	CHIROPRACTORS.	Doctors of Chiropractic are not physicians in the sense referred to in Section 202.150, R. S. Mo. 1949.
98-51	June 18	CLAIMS AGAINST THE STATE.	The State is not liable in damages for the wrongful acts of inmates of a State maintained training school for the care and treatment of feeble-minded and epileptic patients.
99-51	Jan 3	SHERIFFS. FEES.	The taking of a prisoner before the court for trial or confession of guilt by the sheriff does not constitute attendance upon such court by the sheriff. The sheriff is entitled to a fee of \$1.00 for taking the prisoner before the court for trial or confession.
99-51	May 10	LOTTERIES.	A contest in which entrants pay a cash consideration, and in which that entrant receives a cash prize who catches the largest fish within a specific period of time, is a lottery.
99-51	Aug 29	COUNTY COURT VACATION OF COUNTY ROADS. EXECUTION OF QUIT CLAIM DEEDS	County court may vacate county road upon petition of twelve freeholders. Road right of way not used within preceding ten years extinguished by operation of law.

		EXTINGUISHING EASEMENT.	
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on Intangibles tax
INTANGIBLES TAX

Taxation

-- Interest computed from date tax is due, which is date of filing return or March 15th where no return is filed.

January 8, 1951

1-12-51

FILED

Mr. T. R. Allen
Supervisor, Income Tax Unit
Department of Revenue
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"In connection with the filing and payment of intangible personal property tax returns, this department desires a ruling with respect to the delinquent date in the administration of the law and the interest to be collected thereon.

"In making this request I refer you to Laws of Missouri, 1945, p. 1914, and direct your attention to Sections 7, 10 and 11, which read as follows:

"Section 7. When tax return is made-- exception payable what date.--Except for the calendar year 1946, every person who, pursuant to any provision of this Act, is liable for a property tax on intangible personal property, shall on or before March 15 of the year for which the property is subject to said tax, file with the Department of Revenue on a suitable form prepared and distributed by it, a property tax return on intangibles, showing the kind of intangible owned, the amount of yield therefrom and the amount of tax for which he is liable for the year involved. The tax shall be payable at the

Mr. T. R. Allen

time the return is made and shall become delinquent on June 1st of the year in which it is due.'

"Section 10. Director of revenue may extend time--rate of interest.--The Director of Revenue may, for good cause shown, extend the time for filing said property tax returns on intangibles; provided, however, that taxes due on such returns shall bear interest at the rate of one per cent (1%) per month, or part thereof, from the last date on which the return should have been filed.'

"Section 11. Failure to pay tax--rate of interest.--Every person who is liable for any tax pursuant to the provisions of this Act and who fails to pay the same when it is due shall be required to pay as part of such tax interest thereon at the rate of one per cent (1%) per month from such time but not to exceed ten per cent (10%) per annum, and the method of collecting the tax and penalty shall be the same as provided by law in the case of delinquent income taxes.'

"You will note by reference to these three sections that they are contradictory in some respects. The statutes provide that the returns shall be filed on or before March 15 and that remittance must accompany the return. In the other sections pertaining to the collection of interest you will note that the law does not make the return delinquent until June 1 of the year for which it is due.

"In order that this department may proceed within the meaning of the Act, we desire this opinion as to what date shall be used for the purpose of applying the interest rate on delinquent returns."

Mr. T. R. Allen

Section 11 of the intangibles tax law, which you have quoted in your opinion request, fixes the rate of interest to be collected when the tax is not paid when it is due at one per cent per month from the time when the tax is due. Section 7 requires the return to be made on or before March 15th, and the tax is made payable at the time the return is made. We feel that Section 7 fixes the time when the tax becomes due, that is, at the time the return is made. If no return is made, the due date would be the latest date fixed by law for filing a return or March 15th.

Section 7 does provide that the tax shall become delinquent on June 1st of the year in which it is due. We feel, however, that this provision does not govern the time for the computation of interest. Section 11 provides that the method of collecting the tax and penalty shall be the same as provided by law in the case of delinquent income taxes. Section 11367, Laws of Missouri, 1949, page 617, provides in part as follows:

"At the expiration of thirty (30) days after any delinquency, the director of revenue shall certify the name of any individual, association, joint stock company, syndicate, co-partnership, corporation, receiver, trustee, conservators, or other officer appointed by any state or federal court, or any other person or organization from whom any tax under this article shall be due, to the attorney general, and suit shall be instituted in any court of competent jurisdiction by the attorney general, or by the prosecuting attorney of the county at the direction of the attorney general, in the name of the state, to recover such tax and enforce the lien therefor, and service may be had on both residents and nonresidents in the same manner as provided by law in civil actions."

We think that the provision of Section 7 of the intangibles tax law fixing the date upon which the tax becomes delinquent is of significance when construed with the provisions relative to the certification by the director of revenue of delinquent taxes for the purpose of collection by suits. However, we do not feel that it governs the time as of which interest is computed.

Mr. T. R. Allen


CONCLUSION

Therefore, it is the opinion of this department that under the provisions of Section 11 of the intangibles tax law, Laws of Missouri, 1945, page 1914, interest is computed on the intangibles tax at the rate of one per cent per month from the time the tax is due, and that tax becomes due when the return is made. If no return is made, interest is computed from March 15th, the last day for making returns.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

PROBATE JUDGE:

Newly elected Probate Judge not disqualified in case wherein he was executor in absence of an objection, in writing, verified by party in interest.

January 22, 1951



Honorable A. R. Alexander
Judge of Probate Court
Clinton County
Plattsburg, Missouri

Dear Judge Alexander:

This is in reply to your request for an opinion which is as follows:

"I am very much puzzled about the following stated problem and need advice.

"On January 1st, 1951, I became Probate Judge in Clinton County, and by reason of the statute, Laws 1945, page 763, became disqualified to act as executor in an estate to which I was appointed heretofore.

"My semi-annual settlement would have been due in February.

"There are no heirs in this county, and in fact all debts have been paid.

"I could not think of any other thing to do but make up a settlement, make a record of my disqualification, and name some one as administrator with the will annexed to administer the balance.

"But now the question arises in my mind as to whether under the above section, 2444, I can name such administrator. I have prepared the Letter of Administration and bond has been furnished, but since this question has come up in my own mind, I am holding the letters and papers until I can hear from you.

Honorable A. R. Alexander

"I thought I had the business properly arranged, but now I am not satisfied, and await an opinion from you, and direction as to the proper action if I have been wrong."

Section 2444 is now Section 481.130, RSMo 1949, and is as follows:

"No judge of probate shall sit in a case in which he is interested, or in which he may have been counsel or a material witness, or related to either party, or in the determination of any cause or proceedings in the administration and settlement of any estate of which he is or has been executor, administrator, guardian or curator, when any party in interest shall object in writing, verified by affidavit; and when such objections are so made, such cause shall be certified to the circuit court, which court shall hear and determine the cause; and the clerk of the circuit court shall deliver to said probate court a full and complete transcript of the judgment, order or decree made in such cause, which shall be kept with the papers in said office pertaining to said cause; nor shall any such judge be permitted to act as attorney, nor have any partner acting as attorney in any cause originating in such court, nor in which either party is or has been executor, administrator, guardian or curator of an unsettled estate under administration in said court, nor in any cause involving the partition of real property; nor shall the judge or clerk of such court draw or witness any will or make any settlement for any administrator, executor, guardian or curator over which such court may have jurisdiction, nor shall the judge of such court act as deputy or clerk for any other public official or receive any compensation for any public service other than his compensation as such judge; and an acceptance of the office of judge of probate shall operate as a revocation of all letters testamentary and of administration and of guardianship or curatorship held by him at the time of his election,

Honorable A. R. Alexander

and disqualify him from acting in any capacity in such cases in any court of this state. Any probate judge who violates any of the provisions of this section shall forfeit his office and be liable to ouster therefor, and it shall be the duty of the prosecuting attorney of the county or the attorney general to prosecute such ouster proceedings upon proper evidence of such violation being furnished to them."

The statute has been considered by the Courts before, and in the case of *In re Estate of Albert*, 80 Mo. App. Rep. 554, l.c. 560, the Court said:

"The statute provides that if a judge of probate is interested, has been of counsel or is a material witness in the determination of any cause or proceeding in the administration and settlement of an estate, he shall not sit in the matter when any party in interest shall object in writing, verified by affidavit, etc. (R.S. 1889, sec. 3403). No formal objection was made in this case either in writing or otherwise to the newly elected probate judge acting on the report of sale, but the record shows that all the parties, executor and heirs and legatees appeared and consented to the certification of the case to the circuit court. The statute is that no such disqualified judge of the probate shall determine any matter in the settlement of an estate, provided a party in interest objects in writing, verified by affidavit, etc., but the statute does not in terms prohibit the judge from so certifying such a case on his own motion. By fair and reasonable implication it recognizes this inherent right, for a disqualified judge ought not to be compelled to violate his judicial conscience by deciding a cause in which he is personally interested or has been of counsel. We therefore overrule the assignment of error that the circuit court was without jurisdiction to decide the matters in controversy."

Also, the case of *Phillips vs. Blessing*, 127 S.W. (2d) 62, declared the law as follows, l.c. 63:

Honorable A. R. Alexander

"The probate court having no jurisdiction to certify the cause to the circuit court, the latter court acquired no jurisdiction. Morris v. Lane, 44 Mo. App. 1; In re Estate of Albert, 80 Mo. App. 557. If the order disclosed that the probate judge was in fact disqualified, and that the parties in interest requested or consented to the transfer, although no formal affidavit was filed as provided in section 2053, supra, a different question would be presented."

This office has also had occasion to consider the statute in an opinion to Honorable Lee Mullins, under date of June 21, 1935, wherein there was for consideration the question whether or not a probate judge could sit in a case in which he was a witness to a Will. This office concluded that the probate court had authority to hear the case in the absence of any objection, in writing, verified by affidavit duly filed by any party in interest. The opinion also pointed out that under the Albert case, supra, the Court had the authority of certifying the case to the Circuit Court on its own motion.

In consideration of the language of the statute and in the cases which have arisen thereunder, we believe that in the absence of an objection, in writing, verified by affidavit duly filed on behalf of any party in interest, a newly elected probate judge may hear a case wherein he has been an executor.

CONCLUSION

Therefore, it is the opinion of this department that a newly elected probate judge may continue in a case wherein he has been executor, including the appointing of an administrator, executor, including the appointing of an administrator, provided that there has been no objection in writing, verified by affidavit filed on behalf of any party in interest in the case.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

INTANGIBLE TAX) Compensation paid to the estate of a deceased
TAXATION) partner for the use of tangible partnership
) assets is not yield from an intangible and
) therefore not subject to the assessment
) of an intangible personal property tax.

February 20, 1951

2-21-51

Mr. T. R. Allen
Supervisor, Income Tax
Department of Revenue
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office. Your request read as follows:

"The question confronting this department at this time is as follows and I quote herein for your information from a letter received from taxpayers' attorney under date of January 4, 1951:

"Frank Futterman died on October 13, 1947. At the time of his death he was a partner in the clothing business with his brother, Mark Futterman, operating a clothing store on North Broadway in St. Louis, Missouri. After the death of Frank Futterman, Mark Futterman continued to operate the business without making a settlement of the partnership affairs. As the result of this action, a suit was filed in the Circuit Court of St. Louis County for an accounting. A settlement was made in which Mark Futterman paid \$74,146.50, representing the value of the interest of Frank Futterman in the partnership, and paid an additional \$8,881.10 to compensate the Estate of Frank Futterman for the use of the partnership assets during the period from the date of death of Frank Futterman to the date of the settlement.

"The \$8,881.10 was income to the Estate and an income tax return was filed. However, it

Mr. T. R. Allen

was not interest on an account receivable or any other form of intangible property, but was compensation to the estate of a deceased partner for the use of the tangible partnership assets without the consent of the Estate. Under the circumstances, we have advised Mrs. Futterman that she is not required to file an intangible personal property tax return.

"If your Department disagrees with our conclusion, we will be glad to examine any authorities that you may wish to call to our attention."

"The foregoing quoted portion of letter referred to sets out the circumstances wherein there was an interest yield of \$8,881.10 interest, which accrued on a partnership settlement, which resulted from a delay and court action as described herein.

"Will you kindly advise this department whether or not such transactions may be classified as intangible instruments and subject to the intangible tax."

Revised Statutes of Missouri, Section 146.010 defines intangible personal property which is subject to the tax in question, and the term "yield", which is made the basis upon which the tax is assessed, in the following words:

"(1) 'Intangible personal property' means moneys on deposit; bonds, except those which under the constitution or laws of the United States may not be made the subject of a property tax by the State of Missouri; certificates of indebtedness, other than capital notes issued by banks or trust companies; notes; debentures; annuities; accounts receivable; conditional sales contracts, which have incorporated therein promises to pay; and real estate and chattel mortgages.

Mr. T. R. Allen

"(4) The term 'yield' or 'annual yield' means the aggregate proceeds received as a result of ownership or beneficial interest in intangible property whether received in money, credits or property, exclusive of any return of capital, and less the amount of interest required to be credited by the owner thereof, during the preceding calendar year, to reserve liabilities of the owner maintained under the statutes of this state. (L 1945 p. 1760 Sec. 1, L. 1945 p. 1914 Sec. 1, A. 1949 S.B. 1029)"

In order to be subject to the intangible tax the estate of the deceased must have realized a "yield" from intangible personal property as defined above. Whether the estate of the deceased acquired any intangible personal property by the death of a partner and whether there was a yield realized from an intangible asset is largely a matter of fact.

It appears as an accepted fact that the surviving partner paid \$74,146.50 to the estate of the deceased partner which represented the value of the interest in the partnership of the deceased, at the time of his death in October, 1947. Further, the surviving partner paid an additional sum of \$8,881.10 to the estate of the deceased partner to compensate the estate of the deceased for the use of partnership assets during the period from the date of death to the date of settlement of the partnership affairs. The question then is whether or not this \$8,881.10 was yield from an intangible asset belonging to the estate, and subject to the tax. There was no question but what the sum of \$8,881.10 represented income to the estate. However, if it represented rent or compensation to the estate of the deceased partner for the use of tangible assets which had belonged to the partnership prior to its dissolution by the death of a partner, then the estate received no yield from an intangible asset and in fact owned no intangible. The taxpayer states the sum of \$8,881.10 was paid as compensation to the estate of the deceased partner for the use of tangible partnership assets. If this is true then there would be no

Mr. T. R. Allen

intangible personal property tax due from the estate because they have received no yield from an intangible.

If as a matter of fact the surviving partner purchased the interest of the deceased partner at the time of dissolution of the partnership by reason of the death of the partner and paid interest on \$74,146.50 (which represented the value of the interest of the decedent in the partnership) then this interest would represent yield to the estate from an intangible subject to the tax. However, from the statement of the taxpayer, it appears the sum of \$8,881.10 did not represent interest due on the \$74,146.50 share of the decedent but represented compensation to the estate for the continued use of the partnership's property.

Admittedly, the estate of the deceased partner has a claim against the partnership to the extent of the interest of the deceased partner but such a claim pending settlement is not defined by the statute quoted above as an intangible asset subject to the tax.

CONCLUSION

Compensation paid to the estate of a deceased partner for the use of tangible partnership assets is not yield from an intangible and therefore not subject to assessment of an intangible personal property tax.

Respectfully submitted,

APPROVED:

JOHN E. MILLS
Assistant Attorney General

J. E. TAYLOR
Attorney General

TAXATION:
INCOME TAX:

In computing individual state income tax, taxes are allowable deductions only by the person upon whom they are imposed.

March 2, 1951

Mr. T. R. Allen,
Supervisor,
Income Tax,
Department of Revenue,
Jefferson City, Missouri.

FILED

3-14-51

Dear Mr. Allen:

This will acknowledge receipt of your request for an opinion from this office on a question which you present as follows:

"In connection with the administration of State income taxes, I desire an opinion in connection with Section 143.160, Subdivision 4 thereof which reads as follows:

'Taxes: All taxes paid within the year imposed by the authority of the United States or its territories or possessions, or foreign country or under authority of any state, county, school district or municipality or other taxing subdivision of any state or country, not including those assessed against local benefits and inheritance taxes and taxes based on income, except those imposed by the United States on incomes.'

"On January 5, 1950 this department promulgated a ruling in connection with the portion of the Statutes above quoted, same being filed with the Secretary of State, which had to do with the disallowance of certain taxes imposed by the United States in various forms, commonly referred to as 'hidden taxes', which are paid to service organizations or retailers and which become a part of the cost of such service or such merchandise classified as excise taxes, such taxes not being paid direct to the taxing authority by the consumer. Under these classification of taxes are many items, such as cigarette, admission, luxury, liquor, and many other taxes too numerous to mention. These deductions when claimed by taxpayer are almost 100% arbitrary amounts and, likewise, amounts that if the taxpayer is called upon to substantiate cannot be done with any accuracy. This is due to the fact

that their having been included in the cost of service or merchandise and such amounts are not readily segregated or a matter of actual record insofar as the taxpayer is concerned.

"Due to the fact that they are not paid direct to the taxing authority and it being the interpretation of this section of the law that it applies only to taxes paid by the taxpayer to the taxing authority, it is felt that in all equity from the standpoint of administration that such items should not be allowed as a deduction in arriving at taxable income to this state.

"The ruling made by this department is being contested and in order to avoid controversies in this regard which are arising, will you kindly give us your opinion as to the position taken by this department."

We have carefully considered section 143.160 paragraph 4, cited in your letter, which reads as follows:

"In ascertaining net income there may be deducted from gross income derived during the same period the following: * * * *

"(4) Taxes: All taxes paid within the year imposed by the authority of the United States or its territories or possessions, or foreign country or under authority of any state, county, school district or municipality or other taxing subdivision of any state or country, not including those assessed against local benefits and inheritance taxes and taxes based on income, except those imposed by the United States on income."

A careful search of the cases decided by our state courts do not disclose that the particular question involved has been decided by the court. Therefore in construing this statute we may only look for guidance to the general rules of construction of statutes laid down by our courts. One of the primary rules of construction is to determine the intent of the Legislature in enacting the statute as that intent is expressed in the Act. This rule was reiterated by the Supreme Court of Missouri in the case of American Bridge Co. v. Smith, 179 S.W. (2d) 12, l.c. 15, as follows:

"The primary rule of construction of statutes is to ascertain the lawmaker's intent from the words used if possible; and to put upon the language of the Legislature, honestly and faith-

fully, its plain and rational meaning and to promote its object, * * *."

In enacting the statute quoted above from section 143.160 allowing as a deduction from gross income all taxes paid within the year imposed by the designated taxing authorities (with specified exceptions) this department construes this to mean that taxes are deductible only by the person upon whom the tax is imposed.

For specific examples, it is common knowledge that a "merchant's and manufacturer's tax" is levied by the state. This tax paid by a merchant or manufacturer increases the overhead expense incurred in the operation of the business and this cost must be absorbed in the selling price of a commodity when purchased by a consumer. However, we believe it is quite clear that a consumer could not prorate a portion of this tax to the commodity paid for by him and claim such amount as a deductible item as a tax paid. Such was clearly not the intention of the Legislature in providing that all taxes with specified exception would be allowable deductions.

On the other hand there are taxes paid by the purchaser of commodities on services which are not paid directly to the taxing authority but are collected through a distributor or retailer who remits the tax to the taxing authority. An example of this is the state "sales tax" which is levied on the sale and while paid by the purchaser it is not paid directly to the taxing authority by the taxpayer but is collected for the taxing authority through retail dealers. This tax being imposed upon the purchaser is a deductible tax under the state income tax law though not paid directly to the taxing authority. We find as a similar example the "motor vehicle fuel tax" levied at the rate of two cents per gallon on such motor vehicle fuel as gasoline. This tax is not paid by the consumer of gasoline directly to the taxing authority although imposed upon the consumer and collected through a distributor of the motor fuel. This tax is allowed to be deducted by the person upon whom the tax is imposed, i.e. the consumer, although not paid directly by him to the taxing authority.

We can also cite many examples to the converse in which a tax is levied upon the property or income of one individual and becomes a part of the overhead costs of operating a business, but the individual taxpayer to whom these taxes are finally "passed on" who purchases or uses the commodities or business taxed does not have the tax imposed directly upon him and may not claim any part of such cost as a deductible tax.

From the foregoing we arrive at the conclusion that it was the intention of the state Legislature that taxes referred to as

Mr. T. R. Allen,

3-2-51

allowable deductions was meant to be construed that taxes are deductible only by the person upon whom they are imposed by the taxing authority and those taxes which are merely "passed on" to another as a concealed part of the purchase price for goods or services are not deductible as taxes imposed upon the individual taxpayer. Whether any particular tax in question should be allowed as a deduction would depend upon whether that tax was imposed by the taxing authority upon taxpayer making the return or whether it had been imposed upon some other service or commodity and had become a part of the selling price of the service or goods. In the event the tax were merely passed on to the ultimate user of the commodities or services as a part of the selling price then the tax so passed on would not be deductible to the consumer.

Of course, the burden rests with the taxpayer claiming the deduction to establish that he has paid any particular tax imposed upon him and the amount thereof.


CONCLUSION.

For computing individual state income taxes in ascertaining net income there may be deducted from gross income taxes paid within the year imposed by taxing authorities as designated by Section 143.160 (4) RSMo. 1949. It is the construction by this office that the "taxes" referred to in said section are deductible only by the person upon whom they are imposed by the taxing authority.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General.

APPROVED:



J. E. TAYLOR
Attorney General

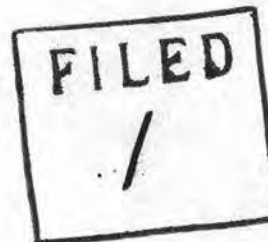
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CONSTITUTIONAL LAW:
TAXATION OF INCOMES:
EXEMPTIONS UNDER HOUSE
BILL NO. 104, TAXABLE
WHEN:

House Bill No. 104, 66th General Assembly providing up to but not exceeding \$3000 service pay received in any one calendar year exempt from state income tax for 1950, and each year thereafter, unconstitutional and void as to exemptions for 1950, violates Subsection 5, Section 39, Article III, Constitution of 1945.

September 4, 1951

9-7-51



Honorable T. R. Allen
Supervisor, Income Tax Unit
Department of Revenue
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your request for a legal opinion of this department, which reads as follows:

"In connection with the administration of the State Income Tax Laws, an opinion is desired in connection with the passage of House Bill 104, 66th General Assembly, with respect to additional exemption to be granted to members of the military forces.

"For your information I quote below subject matter of House Bill No. 104:

"AN ACT Relating to the taxation of the income of members of the armed forces of the United States on active duty, with an emergency clause.

"Section 1. The amount of service pay up to but not exceeding Three Thousand Dollars received by a member of the armed forces of the United States on active duty in any one calendar year shall not be taxable and need not be included in his state income tax return for the year 1950 and every year thereafter. No person receiving a dishonorable discharge shall receive this exemption. The

administrator, executor or next of kin of any deceased member of the armed forces may claim such exemption for such person.

"Section 2. Because the present law as it relates to the service pay of members of the armed forces causes great hardships and suffering among such persons and their families and produces gross inequities, and because this act is necessary for the immediate preservation of the public peace, health and safety of the inhabitants of this state, an emergency exists within the meaning of the constitution and this act shall be in full force and effect and after its passage and approval."

"This bill originated in the early part of the year and you will note in Section 1 that it was to be applicable to the year of 1950. Also, in Section 2 your attention is directed to the fact that this bill carried an emergency clause which provides for its effectiveness on being signed by the Governor. There was some delay in the passage of this bill and according to the records the bill did not become law until April 19, 1951. This, of course, was after the statutory due date for the filing of 1950 returns.

"The question herein involved on which I desire an opinion is whether or not this department can apply this legislation as being applicable to the 1950 year. Of course, in the meantime, many of those in the military service have filed their 1950 returns and paid the tax without any additional exemption being allowed. The matter of claims for credit will be involved and also such members of the military personnel who have not yet filed their 1950 returns will be coming up constantly to be passed on.

"You will, therefore, please advise whether or not House Bill 104 may be applied to transactions covering the filing of returns for the year 1950, as well as claims which may arise in connection with the same year."

The provisions of House Bill 104, are correctly quoted in your letter and we find it unnecessary to repeat it here, and shall refer to it from time to time in the course of our discussion.

Honorable T. R. Allen

We have not been called upon to discuss the time when the bill became legally effective, and we shall assume that the emergency clause of Section 2, was sufficient and that the bill spoke as a law from the effective date of the emergency clause on April 19, 1951.

It is noted that this bill did not change any existing statutes regarding the time, manner of filing income tax returns, the rate of taxes and the payment of same, but that the purpose of the bill was to provide exemptions up to the maximum amount of three thousand dollars of service pay received in any one calendar year by members of the armed forces while on active duty, that such exemptions were not only tax-free but were not required to be included in the return of 1950, and each year thereafter.

Section 143.230, RSMo 1949, in effect provides that those individuals subject to payment of state income tax are required to file a return for the preceding year's income with the director of revenue not later than the thirty first of March following. As intimated in your letter, you are wondering whether or not the exemptions provided in House Bill No. 104, supra, which became effective long after the last date for filing 1950, income tax returns are legally available to such armed forces members making returns for that year's income.

The nature of your inquiry calls for a consideration of the proposition as to whether or not the General Assembly had the power under the Constitution to pass House Bill 104, creating exemptions from income taxes to armed forces members, and to release such persons from the obligation to pay taxes on income for 1950, and each year thereafter, since the obligation had accrued long before House Bill 104, became a law.

In this connection we desire to call attention to the case of Graham Paper Company v. Gehner, 59 S.W. (2d) 49, in which the constitutionality of a former income tax law, and an amendment thereto were discussed, and which we believe to be a case in point with the present situation, and the inquiry presented in your letter.

In this case the court considered the amount of income tax to be paid by a corporation. Under the income tax laws formerly in force, the basis of the tax was the entire net income of the corporation. By an amendment passed in 1927, the tax was based upon the net income received from all sources within the state. Plaintiff corporation offered to pay on 42% of its income received from all sources within the state for the year 1927. Defendant objected and claimed that the method of computation of

Honorable T. R. Allen

taxes for 1927, was incorrect since the amendment did not become effective until July 3, 1927, and that the tax should be based upon net income received during that portion of the year prior to the effective date of the amendment, and should be governed by the former law, and not by the amendment.

While the court discussed the retrospective effect of the law, we are not here concerned with whether or not House Bill 104, is or is not retrospective, but rather with the matter as to whether the General Assembly had the power under the Constitution to pass said bill. In order to sustain our position on this theory we rely upon the opinion in above cited case, particularly that part of the opinion discussing the constitutionality of the new amendment of 1927, at l. c. 51, the court said:

"In this connection the plaintiff contends that although the amended law of 1927 is retrospective in its operation if construed to cover a period antedating the time it went into effect, yet as it is detrimental to the state only, and not to the taxpayer, there is no valid objection, so far as the state is concerned, to the law being retrospective. The provision of the Constitution inhabiting laws retrospective in their operation is for the protection of the citizen and not the state. The law is stated in 12 C. J. 1087 thus: 'The state may constitutionally pass retrospective laws impairing its own rights, and may impose new liabilities with respect to transactions already past on the state itself or on the governmental subdivisions thereof.' See New Orleans v. Clark, 95 U. S. 644, 24 L. Ed. 521. This merely means that such laws are retroactive in their operation, but that the sovereign state may forego or waive its own rights and may be held to have done so by the enactment of the law called in question. It is therefore argued with much force that the act in question merely reduced the income taxes to be collected by the state, beginning with January 1, 1927, and though the act did not go into effect till July 3, 1927, the state could lawfully impair its own rights and relieve the taxpayer of part of the burden of taxes already incurred. Defendants' reply to this is that if the constitutional provision against retrospective laws is available

to citizens only, and not to the state, there is another constitutional provision equally effective and clearly applicable in favor of the state as against legislative enactments purporting to release or extinguish obligations or liabilities to the state or any governmental subdivision of the same, to wit, section 51 of article 4 of the Constitution, which provides: 'The general Assembly shall have no power to release or extinguish, or authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to this state, or to any county or other municipal corporation therein.' The language of this constitutional provision is very broad and comprehensive in protecting the state against legislative acts impairing obligations due to it, in that it prohibits the release or extinguishment, in whole or in part, not only of indebtedness to the state, county, or municipality, but liabilities or obligations of every kind. It will be noticed that this constitutional provision is couched in the language and uses the same terms as are used with reference to retrospective laws. In determining what transactions or considerations are within the purview of retrospective laws, the courts use the same terms as are used in this constitutional provision, to wit, liabilities or obligations, as well as debts. In contending in the Dirckx and Bell Telephone Cases, supra, that income taxes not due or capable of ascertainment till the end of the year could not be the subject of a retrospective law, the same argument was used as is now used to exclude same from the constitutional provision just quoted, to wit, that the income tax for the entire year is a unit and does not come into existence even as an obligation or liability till the end of the year, when for the first time it was capable of ascertainment. That would be true as to being an indebtedness, but, as there pointed out, it is not true as to being an obligation or liability. This argument was rejected as not sound in the Dirckx and Bell Telephone Cases, as it must be here. It was there held that an inchoate tax, though not due or yet payable, is such an obligation

or liability as to be within the protection of the restriction against retrospective laws, and for the same reason we must hold that such inchoate tax is an obligation or liability within the meaning of the constitutional provision now being considered. In other words, if an unmatured tax has sufficient vitality to be protected in favor of the citizens against retrospective laws, it has sufficient vitality to be protected in favor of the state against being extinguished or released by legislative enactment."

The constitutional provision upon which the court based its opinion in above cited case was Section 51, Article IV of the Constitution of 1875. This section has been re-adopted, and is now subsection (5) of Section 39, Article III, of the Constitution of 1945, and reads as follows:

"The general assembly shall not have power:
* * * (5) To release or extinguish or to authorize the releasing or extinguishing, in whole or in part, without consideration, the indebtedness, liability or obligation of any corporation or individual due this state or any county or municipal corporation;
* * *."

As noted above the exemptions created by House Bill 104, were not only tax free, but were not required to be reported in the return for 1950, and each year thereafter. The obligation of the taxpayer to pay income taxes and make a return for the year 1950, part of the bill creating exemptions for the year of 1950, is to be given effect as written, it will be contrary to the holding in above cited case, and in violation of above quoted constitutional provision.

The General Assembly was without power to pass a law, the effect of which is to release obligations to the state, which had accrued before the law became effective, therefore, that part of House Bill 104, relating to exemptions from income taxes for 1950, is unconstitutional and void.

For the reasons given above, and in answer to your inquiry, it is our thought that the provisions of House Bill 104, supra, relating to income tax exemptions, may not be applied to transactions covering the filing of returns for 1950.

Honorable T. R. Allen

CONCLUSION

It is the opinion of this department that House Bill 104, of the 66th General Assembly providing that up to, but not exceeding three thousand dollars of service pay received by members of the armed forces while on active duty shall be exempt from state income taxes for 1950, and each year thereafter is unconstitutional and void as to those exemptions provided for 1950, such provisions being in violation of subsection 5, Section 39, Article III, Constitution of 1945.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

PNC:hr

ADJUTANT GENERAL:

Eligibility for Missouri World War I bonus determined as of date of consideration and ruling upon of claim, and not date of application.

SOLDIERS AND SAILORS:



October 8, 1951

10-12-51

The Adjutant General's Office
Jefferson City
Missouri

ATTENTION: Leo B. Crabbs, Jr., Special Assistant

Dear Sir:

Your recent letter requesting an official opinion of this department regarding the eligibility of a certain individual for the Missouri World War I bonus reads in part as follows:

"This claimant sent in his application in June of 1923 at which time he was advised by this office that the time limit for filing applications for the bonus expired December 31, 1922. His application form was not examined or acted upon at that time but was placed with many others of a similar status in a 'Too Late' file.

"On May 11, 1925 he was paid the New York State bonus in the amount of \$136.00.

"Laws of Missouri, 1925 (page 127), extended the time for filing applications effective April 22, 1925. Claimant's original application was then stamped 'Received and Registered, April 22, 1925, Mo. Soldiers' Bonus Com.' and placed in line for processing. It was examined and sent to the Missouri Soldiers' Bonus Commission recommending disapproval on July 8, 1925. It was disapproved by the Commission and the claimant so notified on August 21, 1925, for the reason that claimant was a non-resident, his service during the war having been accredited by the War Department to the State of New York. This decision of the Missouri Bonus Commission bears the notation that claimant had been paid the New York State bonus at the time the Commission examined his claim.

The Adjutant General's Office
Attention: Leo B. Crabbs, Jr.

"Claimant now alleges he is eligible for the bonus on the grounds that he had not received the New York State bonus when he sent in his application in June, 1923.

"The question arises as to the date when his eligibility should be determined, whether as of the date he sent in his application in June, 1923 or as of the date his application was laid before the Missouri Soldiers' Bonus Commission for approval or disapproval on July 8, 1925."

The only question presented here is whether eligibility is to be determined as of the date of the filing of the application or as of the date of the determination of the claim.

A similar question was before the Court in the case of Dahlin v. Missouri Commission for the Blind, 262 S.W. 420, wherein there was the question of whether a petitioner's eligibility should be determined as of the date of his application or the date the application was passed on by the commission. It was held at l.c. 421, 422 that:

"* * *The question is raised as to the time at which the extent of vision of the applicant is to be determined. Is it the day of filing the application, or the date of the examination by the oculist, or the date the application is passed on by the commission, or the date of the trial in the circuit court on appeal from the commission? The first authoritative determination of the facts is made when the commission passes on the application. We see no reason why the commission should be bound to any date prior to the date of its determination. While the statute provides that the beginning of the pension shall be from the filing of the application, it is apparent that changes in the condition of the applicant as to any of the qualifications necessary to entitle a party to a pension might take place after the filing of the application which change might prevent its allowance.

The Adjutant General's Office
Attention: Leo B. Crabbs, Jr.

"In addition to the question of the degree of sight possessed by the applicant, there are property and other qualifications. An applicant might not be subject to any of these disabilities when the application was filed, or when examined by the oculist, but might be subject thereto when the application is passed on by the commission. In that event, the commission ought, and we think could, under the law, reject the application. Some one or more of these disabilities might be present when the application is filed, but not present when passed upon by the commission. In that event, it would seem that as to the commission the condition at the time of the hearing before the commission should be the proper date at which to determine the facts as to the eligibility of the applicant. Suppose, on the evidence sent to the commission by the probate judge, it should appear that the applicant was eligible, but the commission should learn of other testimony which would show the applicant not eligible. We think that on proper notice to the applicant the commission could secure the attendance of witnesses, and hear further testimony, or, if they should think it advisable, require further examination by approved oculists before passing upon the application. We see no reason why the circuit court could not follow the same course. Our conclusion is that the condition of the applicant at the time of the hearing is to govern, and this applies to both the commission and the circuit court."

We believe the above decision is controlling in the instant case. As stated there by the Court, "some one or more of these disabilities might be present when the application is filed, but not present when passed upon by the commission." Here too, a disability might be present at the time of the determination of the claim, while not present at the time of the application for same. Therefore, since no statutory authority can be found which would warrant holding the date of application to be the date of determination of eligibility, it is our opinion that in view of the above eligibility is to be determined as of the date the claim is considered and ruled upon.

The Adjutant General's Office
Attention: Leo B. Crabbs, Jr.


CONCLUSION

It is therefore the opinion of this department that eligibility for the Missouri World War I bonus is to be determined as of the date the claim is considered and ruled upon, and not as of the date of the filing of the application for same.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RHV:ba

WILLS:
PROBATE COURT:
ADMINISTRATOR WITH
WILL ANNEXED:

Probated will should not be allowed. Will presented for probate too late under the terms of Section 468.470, RSMo 1949.

November 21, 1951

Mr. A. R. Alexander
Judge of Probate Court
Clinton County
Plattsburg, Missouri



Dear Sir:

This will acknowledge receipt of your recent request for an official opinion of this department. The pertinent part of same is as follows:

"Letters of administration were issued July 11, 1950. Publication of the administrator's notice was begun July 19, 1951. The administrator's bond was filed and inventory and appraisal made. The only property listed was a town lot and a few dollars cash. The administrator performed no other duties, and made no semi-annual settlement, final settlement would be due at the August term, 1951.

"On March 5th, 1951, a will was mailed to the probate court from a bank with a statement that it had just been found. No person ever appeared to apply for probate of the will, and it remained sealed in the office files. The administrator was notified. On July 23, 1951, the administrator, an heir, appeared and filed application for probate of the will.

"Should an administrator with will annexed be now appointed? If so, must he publish the usual administrator's notice? And if so, does the administration of the estate extend through the full year from the date of the appointment of the administrator with the will annexed? The statutes involved seem to be Secs. 461.210, 461.440 and 468.580, RSMo 1949."

Mr. A. R. Alexander

We believe the answer to your request is found in Section 468.470, RSMo 1949, which reads as follows:

"When any will is exhibited to be proven, the court, or judge, or clerk thereof in vacation may immediately receive the proof and grant a certificate of probate, or, if such will be rejected, grant a certificate of rejection; provided, however, no proof shall be taken of any will nor any certificate of probate thereof issued, unless such will shall have been presented to a probate court, or judge or clerk thereof in vacation, within one year from the date of the first publication of the notice of granting letters testamentary or of administration that may have been granted by any probate court in the state of Missouri, on the estate of the testator or named in such will so presented."

We believe the fact that his will was not presented to you for probate until July 23, 1951, a year and four days after the first publication of the administrator's notice was begun on July 19, 1951, a year and four days after the first publication of the administrator's notice was begun on July 19, 1951, precluded you from allowing the probate of this will. In order for you to allow the probate of the will the same without doubt would necessarily have had to have been presented to you before the 19th day of July, 1951, or within the one year period in which wills must be presented for probate after the first publication of letters of administration.

Also in this connection we wish to cite you the case of State ex rel. v. Bigger, 117 S.W.(2d) 347, 352 Mo. 502, decided by our Supreme Court in 1944 in which they discussed Section 468.470, supra. In this opinion the court referred to the case of Wyers v. Arnold, 347 Mo. 413, and said as follows:

"There we held that the limitation in this section on the time for probating a will is reasonable, basing our conclusion on the premise that there is no natural or inherent right to dispose of property by will; that the state has the power to prohibit such disposition entirely and, of course, has the lesser power to prescribe the time for probating a will. We said: 'One of the objects of administration is an orderly settlement of the deceased's affairs and the protection and lawful distribution of his property within a reasonable length of time.'"

Mr. A. R. Alexander

In view of the foregoing we feel that this matter can be closed in its regular course.

CONCLUSION

It is, therefore, the opinion of this department that this will, which was presented too late, cannot be probated, and that the probate of this estate should continue to a conclusion in due course.

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ELECTIONS:
SCHOOL BONDS:
ABSENTEE BALLOTS:

Absentee ballots may be cast at
special school bond elections.

June 8, 1951



Honorable Earl A. Bear
Member
Missouri House of Representatives
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for an
opinion which is as follows:

"Will you please give me an opinion
on voting absentee ballots in a
special school bond election."

The provision for the casting of absentee
ballots in elections is found in Section 112.010
RSMo 1949, which is as follows:

"Any person being a duly qualified
elector of the state of Missouri,
other than a person in military or
naval service, who expects to be
absent from the county in which he
is a qualified elector on the day
of holding any special, general or
primary election at which any presi-
dential preference is indicated or
any candidates are chosen or elect-
ed, for any congressional, state,
district, county, town, city, vil-
lage, precinct or judicial offices
or at which questions of public
policy are submitted, or any person
who through illness or physical
disability expects to be prevented
from personally going to the polls
to vote on election day, may vote
at such election as herein provided."

Honorable Earl A. Baer

In the determination of this request it first becomes necessary to determine whether or not school bonds can be voted on at a special election. Section 165.040, RSMo 1949, providing for the issuance of bonds states as follows: "The question of loan shall be decided at an annual school meeting or at a special election to be held for that purpose."

The next question for determination is whether or not a special school bond election is one at "which questions of public policy are submitted" within the meaning of Section 112.010, supra. In an opinion under date of January 31, 1951 (Hungate) this office held that an absentee ballot may be cast in a school re-organization election, basing the reason for this allowance upon the fact that a school re-organization election is a special election, and one at which questions of public policy are submitted. In an early opinion under date of April 10, 1934 (Morris) this office ruled that absentee ballots might be cast at the special election called by the Governor for the purpose of voting on a \$10,000,000 bond issue by constitutional amendment, and held that such an election was one at which questions of public policy are submitted, "namely that of bonding the State."

We do not believe that the phrase "public policy" should be given a strict, technical definition such as is usually cited in the cases. That phrase has been most generally used as a principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good. The term is one of broad significance and cannot be comprehensively defined in specific terms. Public policy has been said to be synonymous with policy of law, and also has been defined as the public good. In many of its aspects the term "public policy" is but another name for public sentiment. (50 C.J. 857, 858).

Election laws must be liberally construed in aid of the right of suffrage. (Application of Lawrence, et al., 185 S.W. (2d) 818, 353 Mo. 1028).

In view of the above we believe the true rule to be that qualified voters may cast an absentee ballot at a special school bond election. We believe that the phrase "questions of public policy" should be given a broad meaning and should be considered in view of the

Honorable Earl A. Baer

context of Section 112.010, RSMo 1949. We believe it carries more of a connotation, "questions which affect the public" or "questions of policy to be decided by the public." The Legislature has provided for a method of testing public sentiment on the question of school bonds. We see no reason to deny to absentees the right to cast ballots on such a question.

CONCLUSION

Therefore, it is the opinion of this department that absentee ballots may be cast at a special school bond election.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

BONDS:

Attorneys may not be sureties on official bonds.

COLLECTOR OF REVENUE:

January 5, 1951

1-6-51

Honorable G. H. Bates
Director
Department of Revenue
Jefferson City, Missouri



Dear Mr. Bates:

This is in reply to your request for an opinion which we re-state as follows:

"Should the Director of Revenue approve the official bond of a County Collector of Revenue when two of the sureties on the bond are attorneys at law?"

In Laws of Missouri, 1943, Section 11056, page 1062, is found the statutory provision for the requirement of a bond for Collectors of Revenue, which provides that: "The official bond required by this section shall be signed by at least five solvent sureties."

Laws of Missouri, 1945, Section 11062, page 1820, provides for approval of a collector's bond by the Director of Revenue, and reads, in part, as follows:

"The collector's bond, when received by the director of revenue, shall be carefully examined, and if found to be made in conformity to law, and the sureties satisfactory, the said director of revenue shall file the same with the Secretary of State, and immediately certify the fact thereof to the clerk of the county court; but if said director of revenue finds said bond to be not in accordance with law,

Honorable G. H. Bates

or if it has reason to doubt the sufficiency of the security, it shall immediately return the bond to the clerk of the county court, who shall notify the collector to correct said bond, or make a new bond, as may be required by the director of revenue. * * * ."

From the above it is seen that if the Director of Revenue finds that the said bond is not in accordance with law he shall immediately return the bond to the clerk of the county court and require a bond which is in accordance with law.

Section 3234, R.S. Mo. 1939, provides:

"No sheriff, collector, constable, county treasurer, attorney at law, clerk of any court of record, judge or justice of any court of record, shall be taken as surety in any official bond that may be given by any officer in this state."

Section 3234 was held to be directory in the case of State ex rel. Howell County vs. Findley, 101 Mo. 368. However, directory provisions of a law are not intended by the Legislature to be disregarded. (State vs. Consolidated School District #40, 217 S.W. (2d) 500, 502).

Since Section 3234, supra, clearly prohibits an attorney at law from becoming a surety in an official bond the Director of Revenue has no alternative but to find that said bond is not in accordance with the law, and under the provisions found in Laws of Missouri, 1945, page 1820, supra, he is under a duty to return the bond to the clerk of the county court for the making of a new bond in accordance with law.

CONCLUSION.

Therefore, it is the opinion of this department that an attorney at law may not be taken as surety in


Honorable G. H. Bates

any official bond that may be given by any officer in this State, and that a bond which has been furnished with an attorney at law as surety may not be approved.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

JRB:ir

NON-INTOXICATING BEER: The Director of Revenue may not use a meter machine for the issuance of stamps for malt liquor and non-intoxicating beer.

March 13, 1951

Honorable G. H. Bates, Director
Department of Revenue
Capitol Building
Jefferson City, Missouri

3/14/51

FILED

5

Dear Sir:

This office is in receipt of your recent request for an official opinion. You thus state your opinion request:

"Section 311560, R. S. Mo. 1949, makes it the duty of the Director of Revenue to provide beer stamps as authorized by the Department of Liquor Control.

"Recently we have been approached with a proposition to issue suitable stamps on a sticker tape through a prepaid meter, such as is now used by some of the departments for postage.

"It is represented that this would be a great accommodation to the breweries, a savings in time, help and expense, and would not jeopardize the collection of the required fee, but would be advantageous to our Department in that we would be paid in advance.

"Before agreeing to such an operation, I am asking if in your opinion the issuance of beer stamps through a prepaid meter would meet the requirements of the above section."

We have been orally informed by you, as supplementing the information contained in your above quoted letter, that your present method of issuing these stamps is that your department orders these stamps printed at a public printing office; that after being printed, these stamps are delivered to you; that the brewery desiring stamps sends your office a draft or money order to pay for a certain number of these stamps; that this order is cleared through the office of the Supervisor of Liquor

Honorable G. H. Bates

Control of the State of Missouri; and that then your office mails to the brewery the number of stamps ordered and paid for.

We have been further informed by you that under the proposed plan, the brewery would install a meter machine at its plant; that each meter would contain a roll of blank sticker tape, and a plate which would print upon each section of the sticker tape, as it came through the meter machine, beer stamps, each one of which, as it came out of the meter machine, would be detached and put on a beer container. Prior to this operation, the brewery would have sent to the Director of Revenue a certain sum of money which would represent the price of a certain number of beer stamps. The meter would then be "set", presumably by an employee of the Director of Revenue, to issue the number of stamps previously paid for.

In your letter, you refer to Section 311.560, RSMo 1949, which section is as follows:

"1. It shall be the duty of the director of revenue to provide suitable and inimitable Missouri excise or inspection stamps and malt liquor and nonintoxicating beer stamps or labels and he shall safely keep the same, together with the plates used in making them, when not in actual use.

"2. The director of revenue shall upon request furnish requisition forms for all stamps and labels. All such requisitions shall be presented in triplicate to the director of revenue and shall be accompanied by a bank draft, money order, certified check or cashier's check, payable to the director of revenue of the state of Missouri, for a sum sufficient to pay for all such stamps or labels. Upon receipt of such requisition the director of revenue shall present the same to the supervisor of liquor control, who shall have the sole authority to approve or disapprove all such requisitions. Such requisition shall be promptly checked by the supervisor of liquor control and, if approved by him, he shall appropriately designate his approval thereon and promptly forward same to the director of revenue who shall promptly forward to the purchaser all stamps stipulated on the requisition for which proper remittance was made, together with one copy of the requisition and the purchaser shall promptly acknowledge to the director of revenue receipt for all such stamps on a receipt form furnished by the director of revenue and returned with such stamps."

Honorable G. H. Bates

Our problem here is to determine whether the use of the meter machine, as described above, would be compatible with the directives of Section 311.560, RSMo 1949, quoted above.

It is the opinion of this department that it would not be for the following reasons.

It will be observed that Part 1 of Section 311.560, supra, states that it shall be the duty of the Director of Revenue to provide "suitable and inimitable Missouri excise or inspection stamps and malt liquor and nonintoxicating beer stamps or labels * * *." Under the current system, this is precisely what the Director of Revenue is doing. Under the one proposed, the Director of Revenue would not be providing these stamps because they would be printed by the meter machine in the brewery as they were used. The meter machine and the sticker tape would be provided by and owned by the brewery. It is not clear in whom ownership of the plate which printed the stamps would be vested, but apparently it too would be in the brewery. Furthermore, Part 1 of the above quoted section also states that the Director of Revenue "shall safely keep the same (beer stamps or labels), together with the plates used in making them, when not in actual use." (Words in parentheses ours.) Under the proposed plan, there would, of course, be no supply of stamps for the Director of Revenue to keep and he could not keep the plates used in making the stamps when these plates were not in actual use because they would be in the meter machines in each brewery in the state of Missouri.

Part 2 of the above quoted section provides, in part, that after the Director of Revenue has received a draft from a brewery for beer stamps, and after the Supervisor of Liquor Control has approved the order, the Director of Revenue shall then forward the stamps to the brewery which has ordered them. Obviously, Part 2 of the section quoted could not be complied with under the proposed meter system of issuance.

From all of the above, it seems clear to us that use of proposed meter machine would not be compatible with Section 311.560, supra. Under the proposed plan there would be a much greater chance that the plates would be stolen and that unpaid-for stamps would be printed, and that the plates would be duplicated with the same result. Obviously, the opportunities for imitation would also be greatly enhanced. It seems clear to us that Section 311.560, supra, does not contemplate the issuance of these stamps by any such method as the one proposed and that issuance by this method would not be compatible with the letter and the clear, over-all intent of Section 311.560, RSMo 1949.

Honorable G. H. Bates


CONCLUSION

The Director of Revenue may not use a meter machine for the issuance of stamps for malt liquor and non-intoxicating beer.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

HPWab

SALES TAX:
TAXATION - SALES:

Liability of purchaser for state sales tax
when sales contracts necessitate delivery
of property outside Missouri.

April 18, 1951

Honorable G. H. Bates,
Director of Revenue
Department of Revenue,
Jefferson City, Missouri.



Dear Sir:

This will acknowledge receipt of your letter requesting an
opinion from this office on the following question:

"Re: Opinion of the Attorney General dated June 12,
1950 - Applicability of the Missouri Sales Tax to
sales by Missouri vendors to Missouri purchasers
involving interstate transportation.

"In the above named opinion it was held by your of-
fice that materials sold under the circumstances
named therein were subject to the Missouri Sales Tax,
even though shipped out of state.

"Counsel for the Missouri Pacific Railroad Company
suggests that your office may have been misled by
the incorrect statement in the original question to
the effect that the material was deadheaded by the
railroad to the out of state destination.

"They contend that actually none of the material was
deadheaded but every single shipment moved under the
railroad's standard bill of lading, and the full tar-
iff rate was paid on each shipment.

"In other words, that the railroad company accepted
said shipment in its capacity as a common carrier,
rather than as the parent company and agent of the
purchaser.

"Brief raising the new point at issue is attached hereto.

"May we ask that you reconsider your opinion of June
12, 1950, and advise us if the same rule would apply
under the circumstances presented in the brief as sub-
mitted."

Honorable G. H. Bates.

The opinion referred to above apparently was an opinion rendered by this office to Mr. W. H. Burke under date of December 16, 1949, the conclusion of which reads as follows:

"It is, therefore, the opinion of this department that the sale of bus and truck supplies to the Missouri Pacific Transportation Company and delivered to the Missouri Pacific Railroad Company as provided by the contract of sale constituted an intrastate transaction inasmuch as the entire contract of sale was completed within the borders of the State of Missouri and such transaction is not exempt from the payment of the Missouri Sales Tax under Section 11409 Mo. R. S. Ann. 1939."

The brief referred to in your letter, which was prepared by Glenn S. Givens, General Attorney and Tax Counsel of the Missouri Pacific Railroad Company, St. Louis, Missouri, states that as a matter of fact the transaction involved constituted a sale in interstate commerce.

The opinion of the Attorney General dated December 16, 1949, referred to herein, is correct in holding that goods sold or purchased in retail transactions in Missouri where the agreement for purchase and sale is to be completed and carried out wholly within this state is subject to the Missouri Sales Tax Act, and it is immaterial that after the goods are purchased they are moved out of this state, or pass into "interstate commerce". If the purchase is completed in Missouri the sale is subject to the sales tax. This is illustrated by the court in the case of Superior Oil Company v. Mississippi, 280 U.S. 390 at l.c. 395, wherein the court related the following example:

"* * *If it (the purchaser) had bought bait for fishing, that it intended to do itself, the purchase would not have been in interstate commerce because the fishing grounds were known by both parties to be beyond the state line.* * *"

However, if as a matter of fact the transaction referred to was not "completed and carried out wholly within the borders of" Missouri then the exemption provided in section 144.030 RSMo. 1949, would be applicable. Said section reads in part as follows:

"1. There is hereby specifically exempted from the provisions of this chapter and from the computation of the tax levied, assessed or payable under this chapter such retail sales as may be made in commerce between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which

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the state of Missouri is prohibited from taxing under the constitution or laws of the United States of America, and such retail sales of tangible personal property which the general assembly of the state of Missouri is prohibited from taxing or further taxing by the constitution of this state."

In the opinion from this office dated December 16, 1949, a portion of Sec. 40 from 11 Am. Jur., Commerce, page 38, was quoted. This section discusses briefly the sale or exchange of goods in interstate commerce in the following words:

"The term 'commerce' includes the purchase, sale, and exchange of goods. In order for a sale or exchange of goods to constitute interstate commerce, there must be a transportation or shipment of commodities from one state to another. A contract of sale between citizens of different states is not a subject of interstate commerce merely because it was negotiated between citizens of different states or by the agent of a company in another state where the agreement itself is to be completed and carried out wholly within the borders of a state. On the other hand, if the element of transportation between the states is present, a sale of goods is universally held to constitute interstate commerce, regardless of which state the agreement of sale was entered into or of whether the goods were ordered by a sales agent or by a purchaser and even though the goods are transported across state lines for the purpose of evading local prohibitory laws. The interstate character of a transaction continues until termination of the shipment by delivery at the place of consignment; and it is the rule that the obligation to pay and the right to recover the amount due according to the contract arise pursuant to interstate commerce. In such transactions Congress has exclusive power to regulate the purchase, sale, and exchange. Conversely, a state is without power to burden, by prohibition, regulation, or taxation, the purchase and sale of commodities while they are the subjects of interstate commerce.* * *"

Retail sales transactions necessitating the transportation of goods from Missouri into other states, and in which title and ownership to such goods pass either in another state, or while the goods are moving in commerce between the states, are exempt from the retail sales tax act. However, any transaction claimed to be exempted

Honorable G. H. Bates.

under the section quoted above as being in interstate commerce must be clearly shown by the taxpayer to be a bona fide sale involving interstate commerce and not merely a subterfuge to evade paying the tax. If it is found as a fact that the sales transaction is completed in this state, then such sale is subject to the tax. This is true even though as an incident of purchase the goods are to be shipped outside the state by the purchaser. However, if it is found as a matter of fact that the seller is obligated under his contract of sale to deliver the tangible personal property which was sold to a point outside the state, the sales tax does not apply, provided the property is not returned to a point within the state for use or consumption. In any event the Director of Revenue shall determine in any particular case whether the exemption claimed actually involved a transaction in interstate commerce or whether only a subterfuge is used to evade paying the tax.

The statement of the taxpayer in the brief filed by Glenn S. Givens, General Attorney and Tax Counsel for the Missouri Pacific Railroad Company, states that the transaction in question contemplated that the property was to be delivered outside the state of Missouri and that title and right to possession to the property passed to the taxpayer outside the state of Missouri or while the property remained in interstate commerce. Accepting this as a true statement of the contract of sale it is the opinion of this department that such a transaction is exempt from the retail sales act by the provision of section 144.030, RSMo. 1949, quoted supra.

CONCLUSION

It is the opinion of this department that a retail sale of tangible personal property by a Missouri seller to a buyer wherein the contract of sale provides for delivery within this state and the transaction is completed in Missouri the sale is subject to the State Retail Sales Act, Chapter 144, R. S. Mo. 1949. Such a sale constitutes an intrastate transaction if the entire contract of sale is completed within the borders of the State of Missouri, and it is immaterial that the purchaser or his agent may subsequently transport the property out of this state; the sales tax applies to such a transaction for the reason that interstate movement does not commence until after the taxable transaction has been completed.

It is further the opinion of this office that retail sales transactions necessitating the transportation of goods from Missouri into other states, and in which title and ownership to such goods pass either in another state, or while the goods are moving in commerce are exempt from the provisions of the retail sales tax act under section 144.030, RSMo. 1949; further, if the seller is obligated under his contract of sale to deliver to a point outside the state the

Honorable G. H. Bates.

sales tax does not apply, provided the property is not returned to a point within the state for use or consumption. It is the duty of the Director of Revenue, however, in any particular case in which the taxpayer claims exemption under the section 144.030 cited above to determine as a matter of fact whether a particular transaction involves an actual shipment in interstate commerce or whether such a subterfuge is used to evade payment of the tax. The burden is upon the taxpayer to establish the fact that such transaction is a bona fide sale in interstate commerce and not merely a medium used to evade the tax due.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
Attorney-General

JEM/ld

SALES TAX:

TAXATION: SALES:

: Transaction in interstate commerce exempt
: from Missouri Retail Sales Act. Whether mer-
: chandise actually passed into interstate move-
: ment may properly be the subject of inquiry
: by the Director of the Department of Revenue,
: and the burden rests with the taxpayer claim-
: ing exemption to prove the merchandise sold
: actually passed into interstate commerce.

Honorable G. H. Bates,
Director of Revenue
Department of Revenue,
Jefferson City, Mo.



April 30, 1951.

5-2-51

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office on the following question:

" Re: Opinion of the Attorney General dated June 12, 1950 - Applicability of the Missouri Sales Tax to sales by Missouri vendors to Missouri purchasers involving interstate transportation.

"Our auditors have recently completed an audit on a steel company in St. Louis and have set them up for sales tax on the sale of a steel bridge sold to a railroad company and loaded on the cars of said railroad company, but destined for delivery out of state.

"We have held that under the above named opinion such sales would be taxable. However, counsel for the railroad company takes the position that said bridge was accepted by the company as a common carrier for delivery to the point out of state, and that the company does not actually secure title to said bridge until the contract for transportation has been completed and the bridge delivered to the point of destination.

"We have held that the railroad company cannot act in a dual capacity but took title and possession on their cars in Missouri.

"Because of the difference of opinion on the above named transaction, may we have your ruling on the matter?"

The opinion referred to in your letter apparently was an opinion rendered by this office to Mr. W. H. Burke under date of December 16, 1949, the conclusion of which reads as follows:

Honorable G. H. Bates.

"It is, therefore, the opinion of this department that the sale of bus and truck supplies to the Missouri Pacific Transportation Company and delivered to the Missouri Pacific Railroad Company as provided by the contract of sale constituted an intrastate transaction inasmuch as the entire contract of sale was completed within the borders of the State of Missouri and such transaction is not exempt from the payment of the Missouri Sales Tax under Section 11409 Mo. R. S. Ann. 1939."

Your attention is also directed to an opinion from this office rendered to the Department of Revenue under date of April 18, 1951, dealing with the same problem. The conclusion reached therein reads as follows:

"It is the opinion of this department that a retail sale of tangible personal property by a Missouri seller to a buyer wherein the contract of sale provides for delivery within this state and the transaction is completed in Missouri the sale is subject to the State Retail Sales Act, Chapter 144, R. S. Mo. 1949. Such a sale constitutes an intrastate transaction if the entire contract of sale is completed within the borders of the State of Missouri, and it is immaterial that the purchaser or his agent may subsequently transport the property out of this state; the sales tax applies to such a transaction for the reason that interstate movement does not commence until after the taxable transaction has been completed.

"It is further the opinion of this office that retail sales transactions necessitating the transportation of goods from Missouri into other states, and in which title and ownership to such goods pass either in another state, or while the goods are moving in commerce are exempt from the provisions of the retail sales tax act under section 144.030, RSMo. 1949; further, if the seller is obligated under his contract of sale to deliver to a point outside the state the sales tax does not apply, provided the property is not returned to a point within the state for use or consumption. It is the duty of the Director of Revenue, however, in any particular case in which the taxpayer claims exemption under the section 144.030 cited above to determine as a matter of fact whether a particular transaction involves an actual shipment in interstate commerce or whether such a subterfuge is used to evade payment of the tax. The burden is upon the taxpayer to establish the fact that such transaction is a bona fide sale in interstate commerce and not merely a medium used to evade the tax due."

Honorable G. H. Bates.

The Missouri Sales Tax Law, Chapter 144, RSMo. 1949, levies a tax on retail sales. Section 144.030 thereof specifies exemptions to the tax. The railroad company and the steel company mentioned in your letter apparently believe the particular sale transaction in question was exempt from the sales tax as a transaction in interstate commerce. The burden rests with the taxpayer to prove the right to an exemption, and the right to be exempt from the payment of the sales tax in this case depends upon whether or not the taxpayer can establish as a fact that the transaction was a sale in interstate commerce. The property sold to the railroad company was loaded on the cars of the said railroad, apparently by the seller, and although the contract called for transportation to a destination outside the state of Missouri, actually there appears no reason why the agent of the railroad company could not deliver the property wherever he was directed by the purchaser after he had accepted the same loaded on cars in St. Louis. If the contract of sale and a bill of lading have no other use than to try to convert a domestic transaction into one of interstate commerce as a means to evade payment of a tax in this or any other state, then the design will fail and such subterfuge should be properly the subject of an inquiry by the Director of the Department of Revenue to determine if the sale in question was a bona fide transaction actually involving interstate commerce and exempt from the tax or only constituted an ineffective attempt to clothe an intrastate sale with the indicia of an interstate transaction to avoid taxation. By your letter you indicate the goods were delivered to the consignee in St. Louis and were from that time on in the hands of the consignee who had exclusive control over the property. The goods passed into the hands of the consignee before they started any interstate movement. The goods passed to the hands of the purchaser in St. Louis to do with as it liked. The transportation company will not be allowed to make purchases in this state, accept delivery in Missouri of the goods purchased, but clothe the transaction with a false aura of an interstate transaction in order to hold the immunities of interstate business.

If the sale is actually one involving delivery of goods in interstate commerce i.e., if the order for the goods has been placed by an outstate purchaser for delivery and use outside Missouri, the transaction would not be subject to the tax in question.

Whether this particular transaction actually involved a delivery of merchandise outside of Missouri this office has no way of knowing. The burden rests upon the taxpayer claiming exemption to establish as a fact that the merchandise was actually delivered outside the state and in the event of question as to whether the goods actually passed into interstate commerce the Director of the Department of Revenue may properly require the taxpayer to show proof of actual delivery of goods outside Missouri.

Honorable G. H. Bates.

CONCLUSION.

Whether tangible personal property actually passes into interstate commerce is a question of fact in the particular case and the Director of the Department of Revenue may properly require the taxpayer claiming exemption from taxation under the Missouri Retail Sales Act for a transaction in interstate commerce to establish that the merchandise actually passed into interstate commerce.


If a contract for sale and purchase of goods requiring delivery to a point outside this state is made as a subterfuge with the purpose being to avoid the Missouri State "Sales Tax" and goods are not actually moved in interstate commerce, such subterfuge will not be effective to evade payment of the tax.

If the sale by a Missouri seller is made to an outstate purchaser in such a manner that the transaction actually involves interstate commerce such a sale would be exempt from the sales tax levied by the Missouri Retail Sales Act.

Respectfully submitted,

JOHN E. MILLS,
Assistant Attorney General.

APPROVED:



J. E. TAYLOR
Attorney-General

JEM/ld

COUNTY COLLECTOR: Fees allowed to county collector and county clerk for making delinquent land lists and back tax book. Accrual of fees to each office for each year of delinquency.

COUNTY CLERK:

May 17, 1951.

Mr. G. H. Bates,
Director of Revenue
State of Missouri,
Jefferson City, Missouri.

5-8-51



Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office. Your request reads as follows:

"Noting that your department, under date of September 27, 1950, held that county collectors are not required to make delinquent land lists of back taxes, we assume that county clerks, in order to prepare the back tax books as provided for in Section 140.060 R. S. Mo. 1949, will consolidate the tax charges appearing on the current delinquent land lists supplied by the collectors, with transfers of back delinquent land tax charges for all prior years appearing on the back tax book, into a new consolidated land back tax book. 10

"Now, assuming that this will be the procedure, what amount of fees per tract or lot does Section 140.100 R. S. Mo., 1949 authorize county collectors and county clerks to charge tax payers whose taxes are delinquent, A: two years; B: three years?"

This office rendered an opinion to the Honorable W. H. Holmes under date of September 27, 1950, in which the following conclusion was reached:

"Therefore, it is the opinion of this department that under the terms of Senate Bill No. 1024 and House Bill No. 2010, Sixty-fifth General Assembly, the County collector is entitled to receive ten cents per lot or tract for making the delinquent land lists of current taxes and is not required to make a delinquent land list of back taxes, and, therefore, may receive no fees for such services. We are further of the opinion that under said bills the county clerk should charge, for making the collector's delinquent land lists into a back tax book, ten cents for each lot or tract recorded in said book, plus five cents for each lot or tract for comparing and authenticating the list."

Mr. G. H. Bates

It was pointed out in that opinion, a copy of which is enclosed, the steps for making the delinquent tax list were as follows: The collector each year makes a list of taxes on the current books which he has been unable to collect. (Section 11110). The list is filed with the county clerk who makes the back tax book. (Section 140.133). The back tax book is delivered to the collector who proceeds to collect the taxes listed therein. Section 11117, R. S. Mo. 1939, provided that the collector should enter the delinquent land list of record in his office. However, Senate Revision Bill No. 1024 of the Sixty-Fifth General Assembly changed this section, and there is now no specific requirement that the collector enter such list of record in his office. This change was recommended by the Committee on Legislative Research and was adopted by the Legislature. While the duty of making the back tax book had been delegated to the county collector since 1933, the revision contained in Senate Bill 1024 (65th General Assembly) delegated the duty to the county clerk, where it had been prior to amendments made in 1933. The history of this legislation is discussed in the opinion referred to above, a copy of which is enclosed herewith. While transferring the duty of making the back tax book to the county clerk and eliminating provisions requiring the collector to record the delinquent tax lists in his office, provisions relating to such recording there were retained and some confusion has resulted from the recommended changes by the committee on Legislative Research. No duty is now imposed on the collector to record the list. He is required to make a current delinquent list, and under this provision would be entitled to ten cents per tract or lot included on such list. Inasmuch as he is not now required to record the list the provisions of Section 52.290 RSMo 1949 reading "and for recording the list of delinquent land and lots, twenty-five cents per tract", are not applicable and the collector may not claim such a fee. We find no statute imposing upon the collector the duty of recording the delinquent land list of back taxes and, therefore, he is entitled to no fees under the section quoted above.

Section 140.010, RSMo 1949 provides in part:

"All real estate upon which taxes remain unpaid on the first day of January, annually, shall be deemed delinquent * * *."

Section 140.020, RSMo 1949, provides in part:

"The taxes due and unpaid on any real estate which has heretofore been returned delinquent, and which has not been forfeited to the state, and the taxes due and unpaid on any real estate which has been forfeited to the state for the nonpayment of such taxes, shall be deemed and held to be back taxes* * *."

Mr. G. H. Bates

Section 140.030, RSMo 1949, provides in part:

"Whenever any collector shall be unable to collect any taxes specified on the tax book * * * he shall make lists thereof * * *, one to be called the 'tangible personal property delinquent list,' * * * and the other to be called the 'land delinquent list' * * *."

Section 140.050, RSMo 1949, provides the county clerk shall make the delinquent list into a back tax book in the following manner:

"1. The county clerk shall file the delinquent lists in his office and within ten days thereafter make, under the seal of the court, the lists into a back tax book as provided in section 140.060.

"2. When completed, the clerk shall deliver the book to the collector taking duplicate receipts therefor, one of which he shall file in his office and the other he shall file with the director of revenue. The clerk shall charge the collector with the aggregate amount of taxes, interest and clerks fees contained in the back tax book.

"3. The collector shall collect such back taxes and may levy upon, seize and distrain tangible personal property and may sell such property for taxes.

"4. In the city of St. Louis, the city comptroller or other proper officer, shall return the back tax book together with the uncollected tax bills within thirty days to the city collector.

"5. If any county court or clerk fails to comply with section 140.040, and this section, to the extent that the collection of taxes cannot be enforced by law, the county court or clerk, or their successors in office, shall correct such omissions at once and return the back tax book to the collector who shall collect such taxes."

Section 140.060, RSMo 1949, specifies the contents of the back tax book and directs how it shall be made up as follows:

Mr. G. H. Bates

"1. The back tax book shall be made up as follows:

"(1) All tracts of land or city lots on which back taxes are due shall be listed in numerical order with the legal description thereof;

"(2) The name of the owner, if known, and if unknown, the name of the person to whom such land was last assessed shall be set forth opposite each tract of land or city or town lot;

"(3) In appropriate columns shall be entered the year or years for which such land is delinquent, the amount of original tax due each fund, the interest due on such tax at the time of making the back tax book, the clerk's fees then due, and the aggregate amount of taxes, interest, and clerk's fees charged against such land for all the years delinquent.

"2. In such cities the back tax book shall be made out, in alphabetical order, in the name of the owner, if known, and if not known, then in the name of the person to whom such land was last assessed.

"3. All taxes, interest and clerk's fees shall bear interest at the rate of ten per cent per annum from the time of making such book until paid. In computing such interest, a fraction of a month shall be counted as a whole month."

Section 140.070 provides that delinquent real estate taxes shall be extended in the back tax book as follows:

"All back taxes, of whatever kind, whether state, county or school, or of any city or incorporated town, appearing due upon delinquent real estates shall be extended in the back tax book made under this chapter, and in case the collector of any city or town shall have omitted or neglected to return to the county collector a list of delinquent lands and lots, as required by section 140.670, the present authorities of such city or town may cause such delinquent list or lists

Mr. G. H. Bates

to be certified, as by said section contemplated, and such delinquent taxes shall be by the county clerk put upon the back tax book and collected by the collector under authority of this chapter; provided, that in all cases where the auditor or other proper officer is required by provision of charter of any city of five thousand or more inhabitants to make the list for city delinquent taxes in this section provided, and to deliver the same to the collector or other proper officer of such city, such collector or other proper officer shall proceed to collect such delinquent list in such back tax book, so made out and delivered to him by the auditor or other proper officer of such city, in the manner and under authority prescribed by this law, and the chapter to which this is amendatory."

Section 140.100, RSMo 1949, provides a penalty on each tract of land in the back tax book and fixes fees allowed to the county clerk and collector as follows:

"1. Each tract of land in the back tax book, in addition to the amount of tax delinquent, shall be charged with a penalty of ten per cent of each year's delinquency except that the penalty on lands redeemed prior to sale shall not exceed one per cent per month or fractional part thereof or ten per cent annually.

"2. For making and recording the delinquent land lists, the collector and the clerk shall receive ten cents per tract or lot and the clerk shall receive five cents per tract or lot for comparing and authenticating such list."

Under this section the county collector would be entitled to a fee of ten cents per tract or lot appearing on the delinquent list made by him, and the clerk would be entitled to a fee of ten cents per lot or tract appearing on the back tax book. The back tax book prepared by the clerk will have incorporated therein the back taxes due for prior years. It will be a consolidation of all delinquent and back taxes remaining due and unpaid. The clerk's fee provided in section 140.100 (of ten cents per tract or lot) shall be charged for each year the tract or lot is entered in the back tax book. The collector's fee (provided for in the same section) shall be charged but once, i.e. when the current delinquent list is made by the collector.

Mr. G. H. Bates

It is further the opinion of this office that the twenty-five cent fee provided for in section 52.290, which has been extended by a collector to a tract or lot when such collector made a delinquent list in the past, should be charged against the tract for the years in which the collector was required to make and record the list in his office. These fees accrued as charges against the tract in the year in which the collector made and recorded the list in his office. The clerk should show in the back tax book the aggregate amount of taxes, interest and fees charged against the land for all the years delinquent as provided in section 140.060, quoted above.

CONCLUSION.

The county collector is entitled to receive ten cents per tract or lot for making the delinquent land list of current taxes and is not required to make a land list of back taxes, and therefore may receive no fees for such services. This fee of ten cents would not be cumulative for each year of delinquency, but would be chargeable only on the current delinquent list.

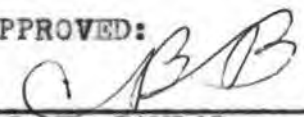
The fee (of twenty-five cents per lot or tract) which has accrued to a county collector for making and recording the back tax list during the years when such a duty was imposed upon the collector shall remain as charges against the lot or tract to be paid by the redeeming party.

The county clerk should charge, for making the collector's "delinquent land lists" into a "back tax book", ten cents for each lot or tract recorded in said book, plus five cents for each lot or tract for comparing and authenticating the list. This "back tax book" will be a consolidation of all back taxes remaining due and unpaid and the clerk's fee will accumulate on each lot or tract for each year the lot or tract is delinquent. The back tax book should show the year or years for which the land is delinquent, the amount of original tax due each fund, the interest due on such tax at the time of making the back tax book, the clerk's fees then due, and the aggregate amount of taxes, interest and clerk's fees charged against such land for all the years delinquent as provided by section 140.060.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney-General

JEM/ld

CONSTITUTIONAL LAW: Proviso in change of venue section
COUNTIES: applicable to counties of less than 75,000
CIRCUIT COURTS: is constitutional.
CHANGE OF VENUE:

June 12, 1951

6-14-51



Honorable Charles V. Barker
Prosecuting Attorney
Polk County
Bolivar, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"I would like to have your opinion concerning the validity of the following quoted part of Section 545.490 of the revised statute of 1949 concerning the change of venue in criminal cases.

" * * * provided, in all cases in counties in this state which now have or may hereafter have a population of less than seventy-five thousand inhabitants if such petition for change of venue is supported by the affidavits of five or more credible disinterested citizens residing in different neighborhoods of the county where said cause is pending, then the court or judge in vacation, shall grant such change of venue, as of course, without additional proof; * * * !

"In particular I am interested in whether or not the above quoted provision violates Article 6 Section 8 of the Missouri Constitution."

Section 545.490, RSMo 1949, a portion of which you

June 12, 1951

quoted in your opinion request, provides for changes of venue in circuit courts.

Section 8, Article VI of the Constitution of Missouri, provides as follows:

"Provision shall be made by general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall not exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."

The general rule to be followed in construing constitutional provisions is found in the case of *State ex rel. v. Koeln*, 61 S.W.2d 750, where the Supreme Court said l.c. 755:

"But under established rules of construction the courts should resolve seemingly conflicting or overlapping provisions of the Constitution by harmonizing them and rendering every word operative, if possible, so as to give effect to the whole."

We believe that the last sentence of Section 8 of Article VI of the Constitution, when construed with the rest of such section, must be held to refer only to laws providing for the organization and powers of counties. It is clear that the purpose of such section is to provide that the administration of county affairs be uniform in each class of counties.

In the case of *State ex inf. v. Kiburz*, 208 S.W.2d 285, the Supreme Court held with regard to Section 8, Article VI of the Constitution, as follows l.c. 287:

"Sec. 8, Art. VI of the 1945 Constitution introduced into the organic law a new requirement with respect to

Honorable Charles V. Barker

June 12, 1951

legislation governing the structure of county government, and so necessitated a general overhauling of the whole body of statute law concerning that subject, for absent classification of counties (and none existed theretofore within the meaning of this constitutional provision), there could be no valid legislation governing their organization and powers, subsequent to July 1, 1946." (Emphasis ours.)

It is obvious that a law relating to changes of venue in circuit courts is not a law relating to the organization or power of a county. Therefore, it is our view that the proviso quoted in your opinion request, found in Section 545.490, RSMo 1949, does not violate the provisions of Section 8, Article VI of the Constitution of Missouri.

CONCLUSION

It is the opinion of this department that Section 545.490, RSMo 1949, is a valid and constitutional law.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:lrt

MOTOR VEHICLES: Registration of a truck when application is made January 1, 1952 should be for one year and an annual registration fee as provided in Section 301.060, RSMo 1949, should be collected.

December 12, 1951

Honorable G. H. Bates
Director
Department of Revenue
State of Missouri
Capitol Building
Jefferson City, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department reads as follows:

"Will you please furnish me an official opinion on the following statements of facts:

"H. B. 283 which relates to the Motor Vehicle License Tax Fees applicable to the State of Missouri, and which are to be collected under this Department, will apparently become effective soon after January 1, 1952.

"Under the present law truck license plates are due and payable January 1 and are sold for twelve months period.

"The question which I wish to propound to you for an official opinion is if the applicant applies for a truck license on January 1, 1952, should our Department sell him a license for the entire year of 1952, as set out in Section 301.060, or should it be limited to the period which will elapse before the new law becomes effective?"

The present statutes now in effect pertaining to the registration of motor vehicles are contained in Chapter

Honorable G. H. Bates

301, RSMo 1949. Section 301.030 of that chapter provides for a system of registration and in part reads:

"Commencing July 1, 1949, motor vehicles shall be registered for a period of twelve consecutive calendar months. There are established twelve registration periods, each of which shall start on the first day of each calendar month of the year and shall end on the last day of the twelfth month from the date of beginning. The period ending January thirty-first shall be designated the first period; * * * * *

All motor vehicles registered by the public service commission shall be allocated to the first registration period. * * * "

From your request we assume you are referring to the registration of motor vehicles used by motor carriers which are licensed and registered by the Public Service Commission during the month of January of each calendar year, as provided in Section 390.110, RSMo 1949. In other words, the statute now requires the registration of such motor vehicles by your department to be accomplished in the first registration period, which would be the month of January.

Section 301.060, RSMo 1949, provides for the payment of a registration fee for all motor vehicles registered by the Department of Revenue, and in part reads:

"The annual registration fee shall be as follows:

"1. For motor vehicles other than commercial motorvehicles and motorcycles and motortricycles. (Fees set out)

"2. For commercial motor vehicles having a gross weight of: (Fees set out)"

(Emphasis ours.)

It is our understanding that Conference Committee Substitute for Amended Senate Committee Substitute for House Bill No. 283 (hereinafter referred to as House Bill No. 283)

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has not been passed by both houses of the Sixty-sixth General Assembly and would, therefore, be classified as pending legislation. However, this Bill in its present form would repeal Section 301.060, RSMo 1949, and enact a new section of the same number wherein a different fee schedule is set up.

Such being the case, we understand your inquiry to be whether you should register a truck when application is made January 1, 1952, for the entire year of 1952, or should said registration be limited to the period which will elapse before House Bill No. 283 becomes effective, and, further, what registration fee should be charged and collected from the applicant.

Regarding the time when laws passed by the General Assembly shall take effect, Section 29, Article III of the Constitution of Missouri, provides as follows:

"No law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, except an appropriation act or in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

House Bill No. 283 in its present form does not have an emergency clause. Furthermore, since it has yet to be passed in the Senate we have no assurance that the Bill will finally be enacted in its present form or, for that matter, enacted at all. In other words, it may or may not be enacted, and it may or may not be enacted in its present form.

Such being the state of affairs relative to this Bill we cannot now determine at what future date it may become effective, nor do we believe that on January 1, 1952 you will be able to determine the future effective date of the Bill. Consequently, as a purely practical matter, we do not see

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how you could register a truck on January 1, 1952 for the period of time existing before House Bill No. 283 becomes effective if you do not know the effective date of said Bill.

Be that as it may, on January 1, 1952 you should be guided solely by the law then in existence and in operation when you undertake the registration of motor vehicles. If House Bill No. 283 is not then in effect, you cannot give it any application.

In this connection the following appears in 59 C. J., Section 673, page 1137-1138:

"The general rule is that a statute speaks from the time it goes into effect and not otherwise, whether that time be the day of its enactment or some future day to which the power enacting the statute has postponed the time of its taking effect. The fixing of a date either by the statute itself or by constitutional provision, when a statute shall be effective, is equivalent to a legislative declaration that the statute shall have no effect until the date designated; and since a statute not yet in effect cannot be considered by the court, the period of time intervening between its passage and its taking effect is not to be counted; but such a statute must be construed as if passed on the day when it took effect. While a statute may have a potential existence, although it will not go into operation until a future time, until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the legislature and approved by the executive has no force whatever for any purpose. Before that time no rights may be acquired under it and no one is bound to regulate his conduct according to its terms, and all acts purporting to have been done under it prior to that time are void."

In State ex rel. Thorp v. Devin, 173 Pac. 2d 994, the

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Supreme Court of Washington at l.c. 998 declared:

"As to the operative effect of a legislative enactment, the rule in this state, and elsewhere generally, is that a statute or an ordinance speaks only from the time it goes into effect."

In Board of Regents for Western Kentucky Normal School et al. v. Engle, 5 S.W. 2d 1062, 224 Ky. 184, the Kentucky Court of Appeals in determining the validity of a sale of state property by the Board of Regents refused to consider a statute, authorizing the Board to sell state property, which had been passed but had not become effective. At S.W. l.c. 1063 the court said:

"By supplemental briefs, our attention is called to the fact that the General Assembly in 1928 passed an act validating the action of the Board of Regents in selling property belonging to the state, but that act contained no emergency clause. It has not taken effect, and this court cannot consider it in any way, for it is not yet in effect."

In Butters v. City of Des Moines et al., 209 N.W. 401, 202 Ia. 30, suit was brought to enjoin the city from proceeding with the performance of a contract for the construction of a storm sewer. It had proceeded under a statute which had been amended. However, the amending statute had not become effective at the time action was taken by the city. The amending statute contained additional requirements which the city had not complied with inasmuch as the additional requirements were not in the prior statute. Plaintiff contended that the city had therefore acted without jurisdiction. In ruling on the matter the court at N.W. l.c. 402 said:

"It is conceded that the law in question, having been passed on the 27th day of April, 1924, became effective and operative on the 18th day of October, 1924. The city counsel, having taken the necessary preliminary steps leading to the passage of the resolution of necessity, met on the 9th of October, 1924, to consider it. The question is: To what

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law should it look for jurisdiction to act, on that particular date? There can be but one answer to this question, and that is, the law as it existed on that date, to wit, the law as it stood prior to these amendments which were added thereto by the special session of the Fortieth General Assembly. It cannot be urged that they were bound to take notice of and act under the amendatory law which was not effective and operative at the time the city council acted. Until the time arrives when a law is to take effect and be in force, a statute which is passed by both houses of the Legislature, and approved by the executive, has no force whatever for any purpose. Before that time no rights may be acquired under it, and no one is bound to regulate his conduct according to its terms. The fixing of a date, either by the statute itself or by constitutional provision, when a statute shall be effective, is equivalent to a legislative declaration that the statute shall have no effect until the date designated. Such seems to be the general consensus of opinion."

(Emphasis ours)

In *Keane v. Cushing*, 15 Mo. App. 96, the St. Louis Court of Appeals, in declaring the rule relative to the consideration to be given a statute not yet in effect, said the following at l.c. 99:

"It is a general rule that, where a constitutional provision prescribes the date at which an act of the legislature shall take effect, until the arrival of that date, it has no force or validity for any purpose whatever; not even for the purpose of imparting notice of its existence. It is said by an authoritative writer on statutory construction: 'A statute which is to become a law at a future date,

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is a nullity in the meantime. It does not even operate as notice to persons to be affected by it; nor does a repealing clause in it put an end to the law to be repealed."

In view of the foregoing authorities, it is apparent that you can give no consideration to House Bill No. 283, which at most is only pending legislation, at the time you register a truck on January 1, 1952, and the statutory provisions solely applicable to such registration would be those contained in Chapter 301, RSMo 1949.

Again examining the applicable statutes, Section 301.030, supra, which established the system of motor vehicle registration, and which is still in effect, provides that "motor vehicles shall be registered for a period of twelve consecutive calendar months." Section 301.060, supra, providing for the registration fee to be paid on motor vehicles, refers to the "annual registration fees." We believe it is, therefore, apparent the legislature at the time of the enactment of these statutes intended that the registration of motor vehicles, including the type mentioned in your request, would be for a period of twelve months, or, in other words, on a yearly basis, and that the registration fee would cover the period of registration and be paid annually.

Consequently it is our thought in regard to the particular type of registration to which you are referring that upon application being made January 1, 1952, registration of the motor vehicle or truck should be for a period of twelve months and the annual registration fee to be charged and collected should be that provided for in Section 301.060, RSMo 1949.

If you would undertake to register said motor vehicle for a shorter period of time you would not be complying with the statute providing for registration for a twelve months' period.

CONCLUSION

In the premises it is the opinion of this department that registration of a truck, when application is made January 1, 1952, should be for a period of twelve consecutive calendar months or for one year, and at the time of such

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registration an annual registration fee should be charged
and collected as provided in Section 301.060, RSMo 1949.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

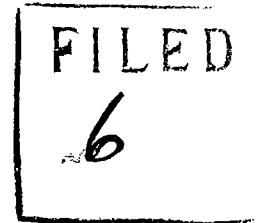
J. E. T.
J. E. TAYLOR
Attorney General of Missouri

RFT:lrt

INHERITANCE TAX:
PROSECUTING ATTORNEY:

Prosecuting Attorney not qualified
to act as appraiser in fixing state
inheritance taxes.

February 6, 1951



Honorable J. Hal Moore
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

Dear Sir:

This department acknowledges receipt of your request for an opinion which reads as follows:

"I would like your opinion as to whether it is lawful for the Prosecuting Attorney to be appointed appraiser for inheritance tax of a deceased person's estate."

The procedure for fixing and determining inheritance taxes due the State of Missouri is to be found in Chapter 145, p. 1424, RSMo 1949, Section numbers hereafter referred to are sections of RSMo 1949.

Section 145.150 authorizes the probate court upon his own motion or on the application of the Prosecuting Attorney or other persons to appoint some qualified tax paying citizen of the county as appraiser to appraise and fix the taxable value of any property or interest therein or income therefrom subject to the payment of inheritance tax under the provisions of Chapter 145.

Subdivision 4 of Section 145.150 requires such appraiser when appointed to take, subscribe and file with the appointing court an oath to faithfully and impartially discharge his duties as such appraiser. Thereupon such appraiser shall fix a time and place for hearing evidence as to the proper amount of such inheritance tax and give notice of such hearing by mail to all interested persons, including the Prosecuting Attorney of the county wherein the estate is being administered.

Section 145.270 makes it the duty of the Prosecuting Attorney to represent the state at all hearings, proceedings and trials in the probate and circuit courts had under Chapter 145. The Attorney

Honorable J. Hal Moore

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General, at the request of the State Director of Revenue, is required to assist the Prosecuting Attorney in any such hearings, proceedings or trials.

Section 145.280 requires that the Prosecuting Attorney of the county wherein the estate is being administered, on his own initiative or at the request of the Director of Revenue, institute suits in any court of competent jurisdiction for the recovery of unpaid state inheritance taxes.

Inheritance tax hearings inevitably center around the value of taxable property. The state and Prosecuting Attorney are interested in the greater valuation, the taxpayer in the lesser.

It is a fundamental of the law, deep rooted in justice and principle, that no person in a judicial or quasi-judicial position may sit in judgment on matters in which he has a personal interest or in which those whom he represents may be financially involved. The duty of the Prosecuting Attorney is first to represent the state, his county and its citizens. It is too obvious for argument that he would not be a qualified appraiser for the purpose of fixing the amount of inheritance taxes due the State of Missouri and be paid by persons whose interests may be opposed to those of the State of Missouri.

CONCLUSION

It is the opinion of this department that the Prosecuting Attorney of a county wherein an estate is being administered is not qualified to act as appraiser for the purpose of fixing inheritance taxes due the State of Missouri.

Respectfully submitted,

GILBERT LAMB
Assistant Attorney General

APPROVED BY:

J. E. TAYLOR
Attorney General

CORONER'S INQUEST:

A "view" or "inquest" must be held where the person is "supposed to have come to his death by violence or casualty."

In order for the coroner to "view" a body there must be an "inquest," Section 58.610, RSMo 1949, makes exception where some credible person declares under oath that the person came to his death by violence or crime; then the coroner, without a jury, shall view the body and declare the cause of death.

"VIEW" PART OF "INQUEST:"

November 26, 1951

Honorable G. C. Beckham
Prosecuting Attorney
Crawford County
Steelville, Missouri



Dear Sir:

This is in reply to your request for an opinion of this department, which request is as follows:

"I would like to have your opinion as to when it is necessary and when not necessary for the coroner to conduct an inquest. This question arises particularly in connection with deaths arising out of automobile accidents on public highways. Section 58.260 Revised Statutes of Missouri, 1949, appears to be very definite in its requirements. In numerous sections, to-wit: 58.520, 58.580 and 58.610 Revised Statutes of Missouri, 1949, a 'view' is referred to. However, I find no statute defining a 'view' or authorizing a 'view'. I understand that the coroners in some of the Counties of the State merely go out and make a sort of an informal investigation, which they call a 'view' and do not have an inquest before a jury of six men, as is required by Section 58.260. I would like to know whether or not the law does provide for a 'view' and the definition of a 'view' and under what circumstances is a 'view' proper."

Honorable G. C. Beckham

We are enclosing herewith a copy of an opinion of this office given Honorable Henry H. Fox, Jr., Prosecuting Attorney, Jackson County, Kansas City, Missouri, dated July 27, 1949 (30). The first seven pages of this opinion to a great extent seem to answer your question. It is to be noted that the coroner should use discretion with respect to determining whether an inquest should be held. However, Section 58.260, RSMo 1949, provides that an inquest shall be held when the deceased person is "supposed" to have come to his death by violence or casualty." We call your attention to that part of Section 58.610, RSMo 1949, which is as follows:

"* * * except in a case in which some credible person shall have declared, under oath, to the coroner, that the person whose body is to be viewed came to his death by violence, or other criminal act of another, the coroner shall not summon any jury, but shall himself view the body and declare the cause of death."

(Emphasis ours.)

Here statutory reference is made to the coroner "viewing the body" without a jury, and his declaring the cause of death.

In Crenshaw v. O'Connell, 235 Mo. App. 1085, 150 S.W. (2d) 489, 1.c. 492, the court in dealing with the coroner's viewing the body and declaring the cause of death said:

"* * * where the dead person is not merely 'supposed' to have come to his death by violence or casualty, but where some credible person has declared under oath to the coroner that the person whose body is to be viewed came to his death by violence or other criminal act of another, the coroner may dispense with a jury and himself view the body and declare the cause of death. * * *

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there was no declaration under oath by any person as to the circumstances under which the deceased had come to his death so as to have entitled defendant to refrain from holding an inquest, and, upon a coroner's view of the body, himself declare the cause of death."

(Emphasis ours.)

We also refer you to Patrick v. Employers Mutual Liability Insurance Company, 233 Mo. App. 251, 118 S.W. (2d) 116, 1.c. 123, where the same subject matter is discussed by the Kansas City Court of Appeals.

The courts fully recognize the fact that definite rules cannot be laid down to cover all situations as to the necessity of holding a coroner's inquest but hold that the coroner must in each case exercise his discretion in light of the facts and circumstances and statutory requirements.

In reply to your inquiry concerning a definition of "view" as used in the law relating to coroners and inquests, we refer you first to Black's Law Dictionary, Third Edition, page 1816, where you will find the following:

"VIEW OF AN INQUEST. A view or inspection taken by a jury, summoned upon an inquisition or inquest, of the place or property to which the inquisition or inquiry refers. Brown."

We also refer you to the case of Lancaster County v. Holyoke, 37 Nebr. 328, 55 N.W. 50, 1.c. 52, 21 L.R.A. 394, where the Supreme Court of Nebraska defined "viewing" as used in connection with the law relating to coroners and inquests. Here the coroner was claiming an allowance of a fee for an examination made by him without a jury. The language of the statute was "For viewing dead body ... \$10.00." In 21 L.R.A. 394, 1.c. 399, the Nebraska court defined "viewing" as follows:

"* * * The word 'viewing,' as here used, means something more than looking, seeing,

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beholding. It means inspection; investigation; an inquiry into the cause of the death of the person. And the coroner cannot alone make this inquiry, and he is not entitled to this fee unless he has, with a jury, held an inquest as provided by law."

In discussing this matter, the Supreme Court of Nebraska in 21 L.R.A. 394, 1.c. 398, 399, said:

"* * * Our statute, however, (in Comp. Stat. chap. 18, sec. 97,) provides: 'The coroner shall hold an inquest upon the dead bodies of such persons only as are supposed to have died by unlawful means.' Under this the coroner has nothing to do with investigating the death of any person unless such person is supposed to have come to his death by unlawful means. If a person was known to have committed suicide, or if he was known to have come to his death from a stroke of lightning, or known to have received his death by a fall from a building, the coroner would have nothing to do with holding an inquest over the body of such persons. The statute last above quoted, when the coroner shall have been notified of the finding of a dead body of a person supposed to have died by unlawful means, requires the coroner to summon forthwith six lawful men of the county to appear before him at a time and place named in the warrant. This statute is mandatory, and if the coroner has received notice of the finding in his county of some one dead and that person is supposed to have died by unlawful means, then it is the duty of the coroner to forthwith summon a jury, and proceed to hold an inquest, and ascertain the cause of the death of the person. Section 105 of the same chapter provided that this jury, having

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inspected the body, heard the testimony, and made all needful inquiries, shall return to the coroner their inquisition in writing. It appears from this statute, then, that, in order for a coroner to act at all,--that is, in order for him to view the body of a person found dead in his own county,-- he must have reached the conclusion that the person came to his death by unlawful means; otherwise he has nothing to do with the dead body. * * * But, when he does act, he can only act in the manner provided by law; that is to say, the coroner, by virtue of his office, has no right to hold an inquest alone. When a person has been found dead and is supposed to have died by unlawful means, the statute provides that the facts as to the manner or means by which deceased came to his death shall be ascertained by a jury."

(Emphasis ours.)

It is to be noted that the Nebraska court was dealing with a statute which required "an inquest upon the dead bodies of such persons only as are supposed to have died by unlawful means," while the Missouri statute requires that an inquest shall be held when the deceased person is "supposed to have come to his death by violence or casualty."

Under our statutes, a "view" or an "inquest" must be held where the person is "supposed to have come to his death by violence or casualty." This, of course, requires a jury. Section 58.610, RSMo 1949, however, makes an exception to the above where some credible person declares under oath to the coroner that the person whose body is to be viewed, came to his death by violence or crime; then in that event the coroner shall not order a jury but shall himself view the body and declare the cause of death. With the above statutory exception there must be an "inquest" before there can be a "view." A view of the body is a part of the inquest as these terms are used in the coroner's and inquest law of the State of Missouri.

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CONCLUSION

It is, therefore, the opinion of this department that a "view" or "inquest" must be held in all cases where the person is supposed to have come to his death by violence or casualty. A "view" of a body is a part of an "inquest" as used in the coroner's and inquest law of Missouri; except where some credible person declares under oath to the coroner that the person whose body is to be viewed came to his death by violence or other criminal act, in which event the coroner shall himself "view" the body and declare the cause of death.

Respectfully submitted,

GROVER C. HUSTON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

GCH/fh

Enclosure

COUNTY COLLECTOR: Amount of official bond of county collector
OFFICIAL BOND: to be based on largest total collection
CONSTITUTIONAL LAW: during any one month of year preceding election.
Provision of section 52.020 RSMo 1949 classifying
counties of less than 85,000 population into
a class, invalid, being in violation of Article
VI, Section 8 of Constitution adopted in 1945.

January 16, 1951

*Constitutional invalidity cured by
HB 1913 66th General Assembly, Bill
Effective Feb 27, 1951. CB Burns*

Honorable J. L. Bess
Prosecuting Attorney for Howell County
West Plains, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting
an opinion from this office. Your request reads as follows:

"The County Court here seems confused over
the amount of bond that the county collector
should furnish and they have asked this
office for an opinion. While I have not
studied the matter closely, there seems
to be some conflicting and confusing
statutes in connection with the matter and
I would like to ask that you look into it
and render me an opinion at the earliest
date possible.

"We desire a conclusion of Section 11056,
Revised Statute Missouri 1939. It is our
contention that the bond of the collector
under daily deposit may be based on the sum
according to the largest collections made
during any calendar week plus 10% during
the year of the election or appointment
of the County Collector. We would like to
know if such a bond could be had on a newly
elected County Collector?"

RS Mo. 1949, Section 52.020 (found in RS Mo. 1939,
Section 11056, as amended by Laws of Missouri 1943, p. 1062)
provides for the county collector in the class of counties
in which Howell County is classified to give an official
bond in the following terms.

"Every collector of the revenue in the
various counties in this state, and the
collector of the revenue in the city of
St. Louis, before entering upon the duties

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of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent of said amount; provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred and fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. The official bond required by this section shall be signed by at least five solvent sureties; provided, that in all counties which now have or which may hereafter have a population of less than eighty-five thousand inhabitants, according to the last preceding federal decennial census, the county court in such counties may require the county collector thereof to deposit daily all collections of money in such depositary or depositaries as may have been selected by such county court in accordance with the provisions of sections 110.130 to 110.160, RSMo 1949, to the credit of a fund to be known as 'County Collector's Fund,' and such depositary or depositaries shall be bound to account for the moneys in such county collector's fund in the same manner as the public funds of every kind and description going into the hands of the county treasurer and under the same depositary bond as required to be given under section 110.160, RSMo 1949; provided further, that when such deposits are so required to be made, such county courts may also require that the bond of the county collector in such counties shall be in the sum equal to the largest collections made during any calendar week of the year immediately preceding his election or appointment, plus ten per cent of said amount; provided further, that no

Mr. J. L. Bess

such county collector shall be required to make daily deposits for such days when his collections do not total at least the sum of one hundred dollars; and provided further, the collector shall not check on such county collector's fund except for the purpose of making the monthly distribution of taxes and licenses collected for distribution as provided by law or for balancing accounts among different depositaries." (Underscoring ours)

You will note particularly from this section that the county collector in a third class county, before entering upon the duties of his office shall give bond in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent of said amount.

This statute, which was enacted before the present state constitution was adopted in 1945, then makes a further provision applicable to those counties having a population of less than eighty-five thousand inhabitants that the county court may in its discretion by order require the county collector to deposit daily all collections of money in such depository as may be selected by the county court; and in such counties wherein deposits are so made daily the county court may also require that the bond of the county collector shall be in the sum equal to the largest collections made during any calendar week of the year immediately preceding his election or appointment, plus ten per cent of said amount.

The state constitution adopted in 1945 contains a provision not found in the preceding state constitution cited as Article VI, Section 8, and reading as follows:

"Provision shall be made by general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall not exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."

Mr. J. L. Bess

The portion of Section 52.020 RSMo 1949 which is based on a classification of counties of less than eighty-five thousand inhabitants is not a law applicable to all counties in a given class and violates the requirement of the constitution that all counties within the same class shall possess the same powers and be subject to the same restrictions and is, in the opinion of this department, invalid.

In the case of State v. Kiburz, 208 SW (2d) 285, decided by the state Supreme Court in December 1947, the court had before it a statute containing a proviso making the county surveyor the ex officio county highway engineer in all counties having more than 50,000 inhabitants, taxable wealth in an excess of \$45,000,000 and either adjoining or containing a city of more than 100,000 inhabitants, which the court held in violation of the 1945 state constitution as not being a "general law" within the constitutional provision requiring law applicable to any county to apply to all counties in the class to which such county belongs. In that case the court wrote:

"Section 8, Art. VI of the 1945 Constitution introduced into the organic law a new requirement with respect to legislation governing the structure of county government, and so necessitated a general overhauling of the whole body of statute law concerning that subject, for absent classification of counties (and none existed theretofore within the meaning of this constitutional provision), there could be no valid legislation governing their organization and powers, subsequent to July 1, 1946. In obedience to this constitutional mandate, the 63rd General Assembly enacted Committee Substitute for House Bill 476, effective December 5, 1945, because of an emergency clause, which classified all of the counties of the state into four classes, basing the same on assessed valuation, and declaring such classification to be "the foundation upon which the whole structure of county government and laws relating thereto rests."

"The second proviso to Section 8660 was in the nature of a limitation upon the

Mr. J. L. Bess

power conferred upon the county court under Section 8655. Its object was to except something out of the terms of that grant of power. A proviso can have no existence apart from the provision it is designed to limit or qualify. So, even assuming that the later enacted classification act was sufficient to validate pre-existing Section 8655 as a general law defining the power of counties (with respect to the office of county highway engineer), under Section 8, Art. VI of the Constitution, because applicable alike to every county in the state, the proviso would have to fall because it is neither applicable to all of the counties of the state, nor to any particular class or classes of counties, as defined by the classification act, and, hence, is in no sense a general law within the meaning of the constitutional provision we are considering."
(Underscoring ours)

The proviso contained in section 52.020, RSMo 1949 which relates to counties of less than 85,000 inhabitants likewise was rendered invalid, being contrary to the provision of the constitution adopted in 1945, because it is neither applicable to all the counties of the state, nor to any particular class or classes of counties, as defined by the classification act, and, hence, is in no sense a general law within the meaning of the constitution provision quoted above.

While the provision of section 52.020, RSMo 1949 allowing the county court in counties of less than eighty-five thousand population to require the county collector to make daily deposits and also provided the bond of the county collector in such county shall be in the sum equal to the largest collections made during any calendar week of the year preceding his election is in violation of the constitution and invalid, the invalidity of this part of the section does not render the portion of the section invalid which requires the county collector to give bond in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent of said amount.

CONCLUSION

A county collector in third class counties is required by section 52.020, RSMo 1949, (cited as RSMo 1939, Section 11056;

Mr. J. L. Bess


amended Laws of Missouri 1943, p. 1062) to give bond in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent of said amount.

That portion of the statute which classifies counties having less than eighty-five thousand inhabitants into a group or class and providing in such counties the county court may require the county collector thereof to deposit daily all collections and also require the bond of the county collector in such counties to be in the sum equal to the largest collections made during any calendar week of the year immediately preceding his election or appointment, plus ten per cent of said amount, was rendered invalid by Article VI, Section 8, of the 1945 constitution, because it is neither applicable to all the counties of the state, nor to any particular class or classes of counties, as defined by the classification act which establishes counties into classes.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED



J. E. TAYLOR
Attorney General

JEM:ba

20
1/15/51

MAGISTRATES:

The judge of the magistrate court does not have the power to make a retroactive order directing the sheriff to be present and attend the court for the days that he was present thereby entitling him to a fee.

April 12, 1951

4-12-FILED
7

Judge Joe Berry
Judge of the Magistrate Court
Benton County
Warsaw, Missouri

Dear Sir:

Reference is made to your letter of March 27, 1951, requesting an opinion of this office which reads as follows:

"In this County, for some time, the Sheriff has been directed to be present in Magistrate Court on every Wednesday, and on this basis he has been paid. Actually, however, during this period, Court has been held on more days than the Sheriff has been paid for, court being held usually several days each week and the Sheriff drawing his \$3.00 per day only for the Wednesdays.

"Is the Magistrate empowered to now make a retroactive order, effective at the beginning of the period, ordering the Sheriff to be present on every day that the court was in session, thereby enabling the Sheriff to collect back pay for the days of the Magistrate Court in the past, that he has not been paid for, but was present and for which no order had been made at that time?"

I am enclosing a copy of our opinion to the Honorable John A. Eversole, Prosecuting Attorney of Washington County, dated January 3, 1947, which may be taken as authority for allowing sheriffs fees for

Judge Joe Berry

attending magistrate court if his attendance has been requested by the judge of said court.

We are assuming from your letter, and for the purposes of this opinion, that there has been no order either oral or written directing the sheriff to attend the magistrate court on the days that he was present and has not been paid.

We direct your attention to Section 2034, R. S. Mo. 1939, which made it the duty of the sheriff to attend court under the general law. Subsequently, in 1945, said section was amended to read as follows:

Section 57.090, RSMo 1949:

"Sheriffs to attend courts - when. - The several sheriffs shall attend each court held in their counties, when so directed by the court; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

This amendment of said section relieves the sheriff of the duty to attend court unless specifically directed by the court to so attend.

This department has on several occasions ruled that the sheriff is not entitled to a fee for attending court unless he is actually present and by direction of the court.

You have stated that you wish to enter an order which is in its nature "nunc pro tunc." We believe that such an order has no application here. The following is found in 28 Words and Phrases at page 981, citing the case of Kertzinger v. Lewis, Ill. App., 45:

"A 'nunc pro tunc' order cannot be made to supply an omission to make an order but only an omission in the record of the order."

(Emphasis ours.)

Looking now to the statutes regulating magistrate courts, we find nothing to indicate that the court was intended to have the power to enter such an order either expressly or as a necessary incident to some specific power. On the contrary we believe that the intention of the legislature was that such an order is to be

Judge Joe Berry

a prerequisite to the right of the sheriff to collect a fee and the magistrate is without the power to provide a sheriff's fee in any other manner except by strict compliance with the statute.


CONCLUSION

Therefore it is the opinion of this department that a judge of the magistrate court is without the power to enter a retroactive order ordering the sheriff to be present on every day that the court was in session, thereby enabling the sheriff to collect back pay for the days that he was present and attended the court but for which no order had been made at that time.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

DDG:hr
encl.

CRIMINAL PROCEDURE: It would not be permissible to join a felony and a misdemeanor in the same indictment or information.

April 20, 1951



4-23-51

Mr. J. L. Bess
Prosecuting Attorney
Howell County
West Plains, Missouri

Dear Mr. Bess:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"Our local Magistrate and myself have been discussing the proper procedure in the handling of drunken driving and careless and reckless driving cases. Due to the fact that we have a good many cases of this type and character and that local attorneys are taking changes of venue constantly in the misdemeanor cases, we have been made to wonder if it would be permissible to join in one complaint or information two counts and then elect to stand on one or the other and accept a plea to the lesser charge in Magistrate Court in cases where thought best. This would avoid having to dismiss the case outright and file a new case under the misdemeanor statute and thus make additional expense."

Drunken driving, as defined in Sections 564.440 and 564.460, RSMo 1949, is a felony. Careless and reckless driving, as defined in Sections 304.010 and 304.570, RSMo 1949, is a misdemeanor. Now, as we understand your problem, you want to know if it would be permissible to join a felony and a misdemeanor in one information in magistrate court.

This cannot be done in any court. The Supreme Court of Missouri sustained this principle in the case of State v. Kurtz, 317 Mo. 380. In the course of that opinion, on page 386, the court said;

Mr. J. L. Bess

"Under our practice it is error to join counts in the same indictment or information charging a felony and misdemeanor. (Storrs v. State, 3 Mo. 9; Hilderbrand v. State, 5 Mo. 548.) It may be taken advantage of either by demurrer or motion in arrest and as defendant complains of the joinder in his motion for a new trial which has been substituted for the motion in arrest (Laws 1925, sec. 4080, p. 198), the question is preserved. The joinder constituted error."


CONCLUSION

It is the opinion of this office that the offenses of driving a motor vehicle while intoxicated, a felony, and careless and reckless driving, a misdemeanor, cannot be charged in the same information, either in magistrate court or circuit court.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

BATab

COUNTY COURTS: County Court of Pettis County is unauthorized
MUNICIPALITIES: to appropriate funds to the Sedalia Chamber
of Commerce fund.

February 21, 1951

Honorable Mike Bogutski
Prosecuting Attorney
Pettis County
Sedalia, Missouri



Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads as follows:

"For sometime, the Chamber of Commerce of Sedalia has felt an increasing need for funds and has been asking the Court Court of Pettis County to appropriate a certain amount out of the county treasury each month for the Chamber of Commerce, to be used in the Chamber's general fund. The County Court is doubtful as to its legal right to make such an appropriation. I therefore request an official opinion from your office as to whether or not the court has such authority.

"If the court is legally authorized to make such payments, it would also like to be informed as to whether these expenditures should be appropriated out of Class 6, or out of some other class."

This department has on several occasions rendered opinions holding that the county court is unauthorized to grant funds or contributions to municipalities that have practically been washed away by floods causing grave health hazards, contributions for airports, glove factories and an American Legion Post. However, we have never passed specifically upon your request.

Section 23, Article VI of the Constitution of Missouri, 1945, prohibits the county court from granting money or anything of value in aid of any corporation, association or individual except as provided in the Constituion, and reads:

Honorable Mike Bogutski

"No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution."

Section 25, Article VI of the Constitution of Missouri, 1945, as amended, follows the foregoing constitutional amendment with an exception contained therein providing that the General Assembly may authorize certain pensions, etc., and reads:

"No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation, except that the general assembly may authorize any municipality to provide for the pensioning of the salaried members of its organized police force or fire department and the widows and minor children of the deceased members, and may authorize any city of more than 40,000 inhabitants to provide for the pensioning of other employees, and the widow and minor children of deceased employees, and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services, and to their beneficiaries or estates."

You do not state for what particular purpose such funds are to be used. Of course, we realize they would in all probability be used for municipal improvements and purposes.

Under any stretch of the imagination, in view of the foregoing constitutional provisions, we cannot conceive how the county court can allocate funds out of the county treasury to the Chamber of Commerce of Sedalia, Missouri.

In view of the foregoing conclusion, we deem it unnecessary to consider the second paragraph of your request.

Honorable Mike Bogutski

CONCLUSION

Therefore, it is the opinion of this department that the County Court of Pettis County has no authority to appropriate funds in the county treasury for or to the Chamber of Commerce of Sedalia, Missouri, to be used in the general fund of that organization.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CORPORATIONS: Service of criminal process on a corporation must be made on the registered agent of the corporation.

February 26, 1951

2-26-51



Mr. Ted A. Bollinger
Prosecuting Attorney
Shelby County
Shelbyville, Missouri

Dear Mr. Bollinger:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"The writer also requests information with regard to the proper procedure to be followed for the service of a criminal warrant upon a Corporation under Section 246.210, RSMo. 1949. The Corporation alleged to have violated the above statute is a foreign Corporation and the question arises whether the said warrant can be served upon the foreman of the crew of workmen in lieu of some corporate officer. As this matter is now pending here an early reply hereto is needed."

The question to be determined concerns the legal process to be followed in bringing a corporation into court for an alleged violation of a criminal statute. An officer or employee of a corporation, when accused of crime, may be arrested and proceeded against as any other individual. But, when the corporation itself is charged with the commission of a crime, a special process is found to be necessary.

The Missouri code of civil procedure defines the process of serving a summons on a corporation in a civil suit, but no such provision can be found in our code of criminal procedure.

Mr. Ted A. Bollinger

The statutes governing this process are incorporated in the general laws pertaining to corporations. Sections 351.370 and 351.380, RSMo. 1949, describe the manner in which a corporation, chartered under the laws of Missouri, may be served with criminal process. And Sections 351.620 and 351.630 make the same provisions for serving a foreign corporation.

Section 351.620, RSMo. 1949, is as follows:

"1. Each foreign corporation authorized to transact business in this state shall have and continuously maintain in this state:

"(1) A registered office which may be, but need not be, the same as its place of business in this state;

"(2) A registered agent, which agent may be either an individual, resident in this state, whose business office is identical with such registered office, or a corporation authorized to transact business in this state having a business office identical with such registered office.

"2. The address, including street and number, if any, of the initial registered office, and the name of the initial registered agent of each foreign corporation shall be stated in its application for a certificate of authority to transact business in this state."

Section 351.630, RSMo. 1949, is as follows:

"1. Service of process in any suit, action, or proceeding, or service of any notice or demand required or permitted by law to be served on a foreign corporation may be made on such corporation by service thereof on the registered agent of such corporation. Whenever any foreign corporation authorized to transact business in this state shall fail to appoint or maintain in this state a registered agent upon whom service of legal process or service of any such notice or demand may be had, or whenever any such registered agent cannot with reasonable diligence be found at the registered office in this state of such

Mr. Ted A. Bollinger

corporation, or whenever the certificate of authority of any foreign corporation shall be forfeited, then and in every such case the secretary of state shall be irrevocably authorized as the agent and representative of such foreign corporation to accept service of any process, or service of any notice or demand required or permitted by law to be served upon such corporation. Service on the secretary of state of any such process, notice, or demand against any such foreign corporation shall be made by delivering to and leaving with him, or with any clerk having charge of the corporation department of his office, duplicate copies of such process, notice, or demand. In the event that any process, notice, or demand is served on the secretary of state, he shall immediately cause a copy thereof to be forwarded by registered mail, addressed to such corporation at it principal office as the same appears in the records of the secretary of state.

"2. Nothing herein contained shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a foreign corporation in any other manner now or hereafter permitted by law.

"3. The secretary of state shall keep a record of all processes, notices, and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto."

The proper procedure for serving a criminal warrant on a foreign corporation is determined by these two sections. Any such corporation, authorized to do business in Missouri, must maintain a registered office in this state and keep a registered agent at said office. Service of any process may be made on such corporation by serving the registered agent thereof. If

Mr. Ted A. Bollinger

any such corporation, however, should by any chance be without the required registered agent, process may be served on the secretary of state. The wording of the law is clear. It means that service must be made on the registered agent at the registered office. No other officer or employee of the corporation can qualify as such agent.


CONCLUSION

It is the opinion of this department that the service of a criminal warrant on a foreign corporation, authorized to transact business in Missouri, must be made by serving said warrant on the registered agent required by law to be appointed and maintained by the corporation, or on the secretary of state if no such agent can be found. A foreman of a crew of workmen is not qualified as such agent, and no such warrant should be served on him. This rule applies also to corporations chartered under the laws of this state.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

BAT:ba

ELECTION CONTESTS

) Ballot boxes or packages, may be opened, for
) recount or correction only in cases of
) contested elections or other judicial pro-
) ceedings specifically named in the
) Constitution.

April 13, 1951

4-13-51

FILED

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Mr. Ted A. Bollinger
Prosecuting Attorney
Shelby County
Shelbyville, Missouri

Dear Mr. Bollinger:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"An opinion of your office is requested on the following statement of fact:

"At the election for County Superintendent of Schools the Clerks and Judges in several School Districts failed to enter the candidates names and vote in the poll books. The only thing appearing in said poll books is the register of voters, not even the tally sheets were used. The issue, therefore, is whether the envelopes containing the ballots may be opened for a recount, and if so, who the proper persons would be to do said opening and counting. If the result is that the districts failing to properly report in the poll book are to be considered as no vote for either candidate there may be an entirely different outcome."

The election of county superintendent of public schools is governed by Section 167.020, RSMo 1949, the second paragraph of which is as follows:

"2. The clerk of the county court shall cause to be delivered to the president or clerk of the board of school directors of the various districts of the county a sufficient number of ballots for the voters of

Mr. Ted A. Bollinger

the district and a tally sheet of sufficient size to contain the names of all the qualified voters of such districts, which tally sheets shall so far as practical conform to the form of poll book set out in section 111.510, RSMo 1949, relating to general elections; and in making the returns of such election, the tally sheets shall be certified by the chairman and secretary of such annual school meeting and attested by the members of the board of directors of the district, who may be present. The voting for county superintendent shall be by ballot and all ballots cast shall be counted for the persons for whom cast, and it is hereby made the duty of the members of the board of directors and the chairman and secretary of the annual school meeting to see that each ballot so cast is counted for the person receiving the same, and it is hereby made the duty of the chairman of the annual school meeting, within two days after such meeting, to transmit the tally sheets and all ballots, in person or by registered letter, to the clerk of the county court; such ballots to be in a sealed package, separate and apart from such tally sheets, such package being properly designated. It shall be the duty of the county clerk, within five days after the annual school meeting, to call to his assistance two magistrates or two qualified voters of the county, and cast up the vote and issue a commission to the person receiving the highest number of votes, for which commission he shall receive a fee of one dollar to be paid by the person commissioned. A tie vote shall cause a vacancy in the office of county superintendent, which shall be filled by appointment by the governor, and the person so appointed shall hold such office till the next annual school meeting and until his successor is elected and qualified. In case a school district is divided by a county line, the county clerk

Mr. Ted A. Bollinger

shall transmit to the president or clerk of the board of directors of such districts two sets of tally sheets and the voters residing on each side of the line shall vote separately and returns shall be made to each county as herein provided. For transmitting the returns of such election, the chairman of the annual meeting shall receive the sum of one dollar to be paid out of the incidental fund of the district."

In the case now under consideration it appears that the local officers in some of the school districts failed to record the votes for county superintendent on the tally sheets and return them to the county clerk as required by law. The votes from these districts cannot be counted unless the sealed packages containing the ballots be opened according to law. The county officials are not authorized to open the ballots for recount or correction.

The Constitution of Missouri undertakes to protect the secrecy of the ballot in Section 3, Article VIII, which is as follows:

"All elections by the people shall be by ballot or by any mechanical method prescribed by law. Every ballot voted shall be numbered in the order received and its number recorded by the election officers on the list of voters opposite the name of the voter. All election officers shall be sworn or affirmed not to disclose how any voter voted: Provided, that in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers may be required to testify and the ballots cast may be opened, examined, counted, compared with the list of voters and received as evidence."

This section was construed by the Supreme Court of Missouri in *State ex rel. Goldman et al.*, 278 S.W. 708. This was a case in prohibition against the Board of Election Commissioners

Mr. Ted A. Bollinger

of Kansas City, Missouri, who had asserted the right under an act of the Legislature to open the ballot boxes in certain precincts of that city, containing the ballots cast in a general city election. The court, referring to this section of the Constitution, said:

"The first portion is the time-worn provision covering the secrecy of the ballot. The proviso, however, is the thing of interest in this case. This proviso limits the broad provisions for secrecy of the ballot, by allowing two things: (1) Allowing the election officers to raise the veil of secrecy and testify in certain named instances; and (2) to further raise the veil of secrecy and permit the ballots to 'be opened, examined, counted, compared with the list of voters, and received as evidence.' Note the word 'counted.' Now when can these officers testify, or these ballot boxes be opened, and the ballots be counted? The new Constitution answers the question. It says:

"(1) In cases of contested elections, (2) grand jury investigations, and (3) in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue."

"Thus the Constitution names the instances where the secrecy of the ballot may be exposed, and the ballots recounted, but a count by an election board is not one of such instances. The makers of the organic law having specifically named the instances and the places at which the boxes may be opened and the ballots counted, all other matters are excluded, this under the familiar rule *Inclusio unius est exclusio alterius*. The law of 1921, relied upon by respondents, conflicts with the new constitutional provision, and therefore falls as an invalid act. There can be no count of ballots by the respondents, and their sole power left is to cast up the returns of the judges and clerks

Mr. Ted A. Bollinger

(absent mistakes upon the face of them)
and certify the results.

"Absent the power granted by the act of 1921, the existing law (section 4874, R. S. 1919) provides that, after the ballots have been counted by the election judges, they shall be sealed up in boxes or packages and returned to respondents, who shall deposit them in their offices, there to remain for twelve months, so sealed up, unless called for in the cases specifically named in the constitutional provision adopted in 1924. Laws 1925, p. 410."

It is clear that ballot boxes or packages may be opened for recount or correction only in cases of contested elections or other judicial proceedings specifically named in the Constitution. Any candidate not satisfied with the result may institute an election contest in circuit court, as provided in Chapter 124, RSMo 1949. Notice of such contest, however, must be given to the opposite party within twenty days after the votes have been officially counted. (Section 124.250)

CONCLUSION

It is the opinion of this office that the county clerk of Shelby County, in the case now under consideration, is under duty to issue a certificate of election to the person receiving the highest number of votes for county superintendent, without counting the ballots from those districts in which no returns were shown on the tally sheets. An election contest then may be brought according to law.

Respectfully submitted,

APPROVED:

B. A. TAYLOR
Assistant Attorney General

J. E. TAYLOR
Attorney General

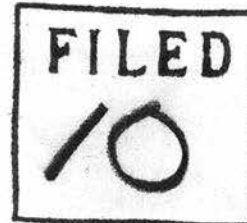
BAT/feh

SCHOOLS: In school district lying in two counties
COUNTY TREASURER: school board cannot issue warrant directing
WARRANTS: county treasurer of one county to pay all
district money to treasurer of other county.

April 23, 1951

5-1-51

Honorable Ted A. Bollinger
Prosecuting Attorney
Shelby County
Shelbyville, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department, which reads:

"An opinion is requested of your office on the following facts:

"Oak Ridge Common School District is located in two counties - 6 square miles and the school building being in Shelby County and 3 square miles lying in Monroe County. School tax moneys, therefore, go to each county resulting in duplicate bookkeeping for the school board. The board wants authority to lump all their money in one county by issuing a warrant on Monroe County payable to the Treasurer of Shelby County for whatever money belongs to their district. The issue, therefore, is whether or not this procedure is legal and proper."

The school district in question, about which you inquire, is one divided by a county boundary line and, therefore, the territory of the district lies in two separate counties. Consequently, in answering your question we will first undertake to set forth the statutes which have a bearing thereon.

Regarding the matter of levying and collecting school taxes within school districts divided by county lines, Section 165.190, R.S. Mo. 1949, in part, provides:

Honorable Ted A. Bollinger

"In all school districts divided by county lines it shall be the duty of the clerk of such school district to report to the clerk of each county in which such district is in part located the number of persons of school age residing in that part of said school district lying within the respective counties, together with the amount of money necessary to maintain the school, and such other funds as it is necessary to raise by taxation in the same manner as is provided in districts not so divided. And it shall be the duty of the county court and county clerk of each county in which such district is located to apportion to said district such part of the public school funds as the enumeration of such parts of said district shows it to be entitled to, and all moneys collected for school purposes as taxes on property within such district shall be paid to said district the same as if it lay entirely within one county."

In reading the above statute it appears that the clerk of such school district is required to submit reports to the clerk of each county in which the district lies, wherein certain information is given relative to the maintenance of the school within said district, including the amount of money necessary to maintain said school and which may be necessary to raise by taxation. Thereafter, the school moneys received by apportionment or by taxation are paid to the school district within each county in which said school district is located the same as if the district lay entirely within one county.

Also pertaining to school moneys received by a school district, including tax moneys, and relating to the manner in which said school moneys are handled and paid out, Section 165.110, R.S. No. 1949, in part, provides:

"All school moneys received by a school district shall be disbursed only for the purposes for which they were levied, collected or received. There are hereby created the following funds for the accounting of all school moneys: Teachers' fund, incidental fund, free textbook fund, building fund, sinking fund, and interest fund. School district moneys shall be disbursed only through warrants drawn by

Honorable Ted A. Bollinger

order of the board of education. Each warrant shall show the legal identification of the district by name or by number as provided by law; shall specify the amount to be paid; to whom payment is made; from what fund; for what purpose; the date of the board order, and the number of the warrant. Each warrant must be signed by the president and the secretary or clerk. No warrant shall be drawn for the payment of any school district indebtedness unless there is sufficient money in the treasury and in the proper fund for the payment of said indebtedness.

* * * * *

"The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the teachers' fund, except as herein provided. Money apportioned by the state for transportation and money derived from taxation for incidental expenses shall be credited to the incidental fund. Money apportioned for free textbooks shall be credited to the free textbook fund. All money derived from taxation or received from the state for the erection of school buildings, from sale of school sites, schoolhouse or school furniture, from insurance, from sale of bonds, shall be placed to the credit of the building fund. Money derived from taxation for the retirement of bonds shall be credited to the sinking fund. Money derived from taxation for the payment of interest on bonded indebtedness shall be credited to the interest fund. Receipts from delinquent taxes shall be allocated to the several funds on the same basis as receipts from current taxes, except that where the previous years' obligations of the district would be affected by such distribution, the delinquent taxes shall be distributed

Honorable Ted A. Bollinger

according to the tax levies made for the years in which the obligations were incurred. * * *

"No treasurer shall honor any warrant unless it be in the proper form, and each and every warrant shall be paid from its appropriate fund, as provided by law. * * *"

According to the procedure set out in the above-quoted statute all school moneys received, be they in the form of taxes or otherwise, are paid to the county treasurer in which said district lies. Said school moneys so received are contained in some six separate funds which are created by the statute, and the county treasurer is required to open an account for each fund.

From the above section it appears that the school moneys received by the county treasurer, and credited to each of the six separate funds, can only be disbursed or paid out upon properly executed warrants directing said treasurer to pay money from a particular fund. Further in this connection, Section 165.230, R.S. Mo. 1949, in part, provides:

"Upon the order of the board of directors, it shall be the duty of the district clerk to draw warrants on the county treasurer in favor of any party to whom the district has become legally indebted, either for services as teacher, for material purchased for the use of the school or material or labor in the erection of a schoolhouse for said district - the said warrant to be paid out of any moneys in the appropriate funds in the hands of the said treasurer and belonging to the district. The species of indebtedness must be clearly stated and should be drawn on its appropriate funds; * * *"

Taxes levied and collected on property lying within the school district which is located in two counties would be paid to and received by the county treasurer of each county, and from the statutes heretofore cited said tax money could only be disbursed by the county treasurer of each county as provided by law and for the payment of school district indebtedness.

Honorable Ted A. Bollinger

In reading the statutes heretofore cited, which are appropriate to the question, we find no specific authority for the board of directors of the school district to lump all the school district money in one county by issuing a warrant directing the county treasurer of one county to pay all of the particular school district money to the county treasurer of another county in which the district is also located. Nor do we find any statutory authority which would authorize a county treasurer to make such a transfer of school funds.

Regarding the authority of the board of directors of a school district, the courts have declared that it has only such powers as are expressly conferred by statute. Thus, in the case of Consolidated School Dist. No. 6 v. Shawhan, et al., 273 S.W. 182, 1.c. 184, the court said:

"Under our state law the government of a school district, as well as the handling of the finances thereof, is vested in a board of directors duly elected by vote. Their powers and duties are prescribed by statute. * * *

"Plaintiff district is a corporation created by statute; its board of directors is what the statute makes it, having only such powers and functions as are expressly delegated to it. * * *"

And, again in the more recent case of Cape Girardeau School Dist. No. 63 v. Frye, 225 S.W. (2d) 484, the court, in declaring the authority of the board of directors of a school district, said at 1.c. 488:

" * * * A board of directors is but a creature of statute, and its members can exercise no authority unless the same is either expressly conferred or else arises by necessary implication from the powers that are conferred. * * *"

In view of the above rule relative to the authority of the board of directors of a school district, it is our view that, since the statutes are silent in giving authority to a board of directors to transfer school moneys in the manner about which you inquire, said transfer of school moneys could not be made.

Honorable Ted A. Bollinger

CONCLUSION

Accordingly, it is the opinion of this department that the board of directors of a school district located in two counties has no authority to issue a warrant directing the county treasurer of one county in which school moneys are received for the school district to pay said school moneys to the county treasurer of the other county in which the school district lies.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RFT:ml

COUNTIES ADOPTING
TOWNSHIP ORGANIZATION:
COUNTY COLLECTOR OF REVENUE:
COUNTY TREASURER:
COUNTY ASSESSOR:

When a county adopts the township organization form of county government the county collector of revenue and the county assessor in office at the time when township organization becomes effective in said county, continue to hold their office until their respective

January 5, 1951

terms expire as provided for in Section 14020, R. S. Mo. 1939. The County treasurer under such a situation continues to serve as county treasurer.



Mr. C. Dudley Brandom
Prosecuting Attorney
Daviness County
Gallatin, Missouri

1-12-51

Dear Sir:

You have requested an official opinion by this department upon the following questions:

"Question 1 The Collector, elected in the current election to serve a term of four years under the present county organization plan of government: What is the Collector elect's status? Is he not without an office to fill and consequently a non-existent entity?

"Question 2 The Collector incumbent, serving at present as Collector under county organization type of government: What is his status? How long does he continue in office? What are his duties? What taxes does he continue to collect? To whom are said taxes paid? To whom does he deliver his books and records when his term of office expires?

"Question 3 The Treasurer elect, having been elected in the current election for a term of four years, supposedly to serve under county organization form of government: What is his status? Is he also elected to fill an office which no longer exists and consequently a non-existent entity?

"Question 4 The Treasurer incumbent, who was originally elected for a four-year term as Treasurer and Ex Officio Collector expiring April 1, 1949, who before the expiration of his said term became Treasurer as a holdover Treasurer since during his term township organization form of government ceased and county

Mr. C. Dudley . Brandom

organization form of government was adopted, he serving as holdover Treasurer until the last general election, that being the current election: What is his status, does he again become the Treasurer and Ex Officio Collector under the township organization form of government to serve until the next general election in November of 1952, and what are his duties and privileges as such?

"Question 5. Assuming from question 4 that the Treasurer and Ex Officio Collector holds over until the next general election:

"(a) On what date or at what time does he have the right and privilege to demand the books and records of the Ex Officio Collector?

"(b) When and at what time does he again assume the duties as Ex Officio Collector should be so elect?

"(c) Does he again collect corporation taxes and back taxes as the customary Ex Officio Collector does, and when does he commence such?

"Question 6. The assessor elected to serve for four years under the county organization form of government: Does he continue to serve until his elective term expires? If not, how long does he serve and what are his duties if his term is cut short?

"Question 7. Township Organization:

"(a) Does any property formerly belonging to the township and then being acquired by the county under county organization revert to the township when township form of government is again adopted?

"(b) When township form of government is adopted at an election such as here stated, who forms the governing body of each township? Under what authority? What authority and duties do they have?

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"(c) The taxes collected for the year 1949 on real estate: Do any of the townships receive any amount of the said tax money? If so, when? how? from whom? and to what extent? If not, when are they privileged to receive tax money and from what source?"

You have stated in your letter that the majority of the voters of your county voted at the November 1950 general election in favor of the township organization form of government.

Section 13931, R. S. Mo. 1939, Reenacted Laws 1945, page 1972, provides in part, as follows:

"If a majority of the electors voting upon the proposition shall vote for the adoption thereof the township organization form of county government shall be declared to have been adopted: Provided, that counties adopting township organization shall be subject to and governed by the provisions of the law relating to township organization on and after the last Tuesday in March next succeeding the election at which such township organization was adopted."

By virtue of the provisions of this section the adoption of the township organization form of county government will go into operation on and after the last Tuesday in March, 1951.

In answer to question number one we would like to call your attention to Section 14020, R. S. Mo. 1939. This section reads as follows:

"In any county in this state which may hereafter adopt township organization, the person holding the office of the collector of the revenue and the person holding the office of county assessor in such county, at the time in March when township organization becomes effective in such county, shall continue to hold his office and exercise all the functions and receive all the fees and emoluments thereof until the time at which his term of office would have expired had such county not adopted township organization, and, except as herein otherwise provided, he shall perform the same duties and be subject to the same requirements and liabilities as in counties not under township organization. Such county assessor shall assess the property of the various townships in

Mr. C. Dudley Brandom

such county and arrange his books and lists in the same manner as required by this statute of township assessors, so that it can be determined which township is entitled to the taxes assessed against any property. The county clerk of such county shall make out, for the use of such county collector, lists of the property assessed in each township the same as, by the provisions of this chapter, he is required to make out for the use of township collectors. The said collector of the revenue in such county shall pay over to the several township trustees of such county after deducting his commission, all township taxes and funds of every kind collected by him and belonging respectively to the several townships in said county, as required by Section 14014 of this chapter, in the case of township collectors, and for his failure to do so he shall be subject to the same liability as provided by said section in the case of township collectors. The first township collectors in such county shall be elected at the township election held in March next preceding the time at which the said term of office of the said collector of the revenue in such county shall expire and their terms of office shall begin at the expiration of the term of office of the said collector of the revenue, and they shall hold their offices until the next township election in said county. The township clerks in such county shall not be ex officio township assessors until after the expiration of the term of office of the said county assessor."

The Collector of Revenue who was elected at the general election in November, 1950, will take the office to which he was elected the first Monday in March, 1951, and will serve the term of four years as provided by the above statute.

In answer to question number two, we call your attention to Section 11073, R. S. Mo. 1939, which provides that the term of the collector will expire on the first Monday in March of the year in which he is required to make his last final settlement. This would be the first Monday in March, 1951. His term will end at that time. He will collect all taxes to be collected by a county collector of revenue until that time. He will then turn over his office and books to the collector who was elected

Mr. C. Dudley Brandom

at the November 1950 general election, as provided by law.

In answer to question number three we would like to call your attention to the following sections.

Section 13789, R. S. Mo. 1939, Reenacted Laws 1945, page 1392, Laws 1947, Vol. 1, page 429, (Section 54.01 R. S. Mo. 1949) reads as follows:

"There is hereby created in all the counties of this state the office of county treasurer."

Section 13789a, Added Laws 1947, Vol. 1, page 429 (Sec. 54.03 R.S. Mo. 1949) provides as follows:

"In counties of Classes 3 and 4 the qualified electors shall elect a county treasurer at the general election in the year 1950, except that in those counties having adopted the township alternative form of county government the qualified electors shall elect a county treasurer at the November election in 1948. The county treasurer so elected shall be commissioned by the county court of his county, shall enter upon the discharge of the duties of his office on the first day of January following his election, and shall hold his office for a term of four years and until his successor is elected and qualified unless sooner removed from office. In counties which have adopted the township alternative form of county government the treasurer's term shall extend until the 1st day of April next after the election of his successor."

The treasurer elect will assume the duties of his office on the first day of January, 1951, and, shall hold this office for a term of four years. The office of county treasurer exists in all counties of this state regardless of the form of government under which the county operates. He will not perform the duties of ex officio collector of the county until the term of the collector of revenue expires, as we have set forth in answer to question number one.

In answer to question number four we cannot see how the present incumbent treasurer would again become the treasurer and ex officio collector of your county. His term will expire December 31, 1950 and he will not be in office on the last Tuesday in March, 1951, when the township organization form of county government goes into effect.

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Question number five need not be answered. In answer to question number six we again call your attention to Section 14020, supra. The assessor elected at the November 1948 general election shall serve until his term expires.

Our answer to your question 7a must be in the negative because we cannot find any statutory authority by which the county is divested of its title to such property. When the townships were dissolved by the previous election, they ceased to exist as political subdivisions of the state. The county acquired title to the property of said non-existent townships as well as the responsibility of paying their liabilities as previously decided in an opinion by this office dated January 17, 1947, that was sent to Mr. Bert E. Morgan, clerk of the county court of Daviess County.

Counties are political subdivisions of the state and hold their property in subordination to, and under the control of, the Legislature (See Barton County v. Walser, 47 Mo. 189)

Since the Legislature has failed to provide for divesting the county of its title to the property it has previously acquired from the existent townships, the property belongs to the county and can only be used or leased by the county as provided by law. 52 Am. Jur. page 498, says:

"* * *Where part of an existing township is detached and the part so detached is organized as a new township, no provision being made for the division or apportionment of the assets of the old township, it has been held that the new township may not recover of the old any part of the cash in the hands of the county treasurer and due the old township at the time of the division, or received by the treasurer for it after the division, from tax levies made prior to the divisions.
* * *"

A full answer to your question number 7b would require a lengthy discussion of the township organization form of county government. The governing body of the township is the board of directors, which is composed of the township trustee and two members of the township board. Their duties are set forth in Article IX of Chapter 101 of the Revised Statutes of Missouri, 1939. The Supreme Court of Missouri in Jensen v. Wilson Township, Gentry County, 145 S.W.(2d)372, 346 Mo. 1199, said:

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"Gentry County is organized under the provisions of the Township Organization Law. Chap. 86, R. S. 1929, Mo. St. Ann. Sec. 12251 et seq., p. 8119 et seq. This law provides that each township as a body corporate shall be governed by a board of directors. One of the duties of the board is to audit all accounts of township officers for services and all other accounts or demands against the township which are legally presented to it. Sec. 12299, R. S. 1929, Mo. St. Ann. Sec. 12299, p. 8137. The board must determine what claims are just and proper. But the authority of the board in the allowance of claims is further limited to those which have been verified. Section 12301, R.S. 1929, Mo. St. Ann. Sec 12301, at p. 8138, says: '* * *but in no case shall the township board be authorized to allow any claim, or any part thereof, until the claimant makes out a statement, verified by affidavit to the amount and nature of his claim, setting forth that the same is correct and unpaid, or, if any part thereof has been paid, setting forth how much.'"

"* * *A township board functions not as a court of broad jurisdiction but as the agent of the township with limited authority. Consequently, it is even more essential that its authority be exercised in strict compliance with the powers granted to it. Such a board comes under the same rule as a county court. * * *"

"In the case at bar the statutory requirement of verification is not a mere formality which may be overlooked. It is a matter of substance which is mandatory and must be followed. See National Supply Co. v. IZARD County, Ark., 190 Ark. 744, 81 S.W. 2d 842. In approving the unverified claims on which these warrants were issued the board has acted not only without authority but also in direct violation of an express limitation on its power. Such action was a nullity and renders the warrants void. 20 C.J.S.; Counties, Sec. 249."

Mr. C. Dudley Brandom

The Supreme Court of Missouri in the case of Wright County v. Farmers & Merchants' Bank, 30 S.W.2d. 32, said:

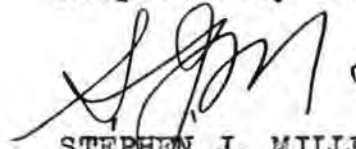
"* * *Moreover, an organized township, in a county under township organization, is a political subdivision of the state under section 12, art. VI of the Constitution. Drainage Dist. v. Trail Creek Tp., 317 Mo. 933, 941, 297 S.W. 1. This also gives us jurisdiction."

In answer to question 7c we would like to call your attention to Section 14019 and Section 14021, R. S. Mo. 1939. Your question relates to the taxes collected for the year 1949. We do not see how the townships could have any possible claim to taxes collected for the year 1949. If you meant to ask about taxes collected for the year 1950 then the answer would be that the townships have no claim to any 1950 taxes.

CONCLUSION

The answer to numerous questions concerning the status of the county collector of revenue, county treasurer and county assessor, of Daviess County when the majority of the voters of said county voted at the November 1950 General Election in favor of the township organization form of county government have been set forth in the body of this opinion. We will not try to summarize the answers as set forth above.

Respectfully submitted,



STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SJM:mw

COUNTY COURT:

ROADS, VACATION OF:

Petition to vacate road must be publicly read on the first day of the regular term of court at which the petition is presented, and must be publicly read again on the first day of the next regular term. Notice of the filing of such petition must be personally served on persons residing in the district whose lands are crossed or touched by the road sought to be vacated in the same manner as other notices are required to be served.

Hon. Edwin F. Brady,
Prosecuting Attorney
Benton County,
Warsaw, Missouri.

April 11, 1951

FILED

6-15-51

Dear Sir:

This department is in receipt of your recent request for an official opinion upon the following matter:

"The county court begins its regular terms on the first Mondays of February, May, August and November. They hold adjourned terms beginning on the first Mondays of January, March, April, June, July, September, October and December.

"Section 228.110 provides that the petition to vacate a road shall be publicly read on the first day of the term at which it is presented. Can this be at an adjourned term, or must it be at a regular term? The section then provides that the matter shall be continued until the next term. Can this continuance be to the next adjourned term, or must it be to the next regular term? The section further provides that after notice the petition shall be publicly read again on the first day of the next regular term, which it is presumed means the next regular term and not the next adjourned term.

"This interpretation is requested for the guidance of the county court and in the light of the decisions holding that the public has a vested interest in public highways, which cannot be vacated except as prescribed.

"One other point which may come up is whether persons residing in the district whose lands are crossed or touched by the road must be served personally if they have already signed the petition. It would seem to me that they should be served personally whether they have signed the petition or not."

Hon. Edwin F. Brady,

Your attention is first directed to Section 228.110, RSMo. 1949, which reads as follows:

"1. Any twelve freeholders of the township or townships through which a road runs may make application for the vacation of any such road or part of the same as useless, and the repairing of the same an unreasonable burden upon the district or districts. The petition shall be publicly read on the first day of the term at which it is presented, and the matter continued without further proceedings until the next term.

"2. Notice of the filing of such petition and of the road sought to be vacated shall be posted up in not less than three public places in such township or townships, at least twenty days before the first day of the next term of the court, and a copy of the same shall be personally served on all the persons residing in said district whose lands are crossed or touched by the road proposed to be vacated in the same manner as other notices are required to be served by law; and at the next regular term the same shall again be publicly read on the first day thereof.

"3. If no remonstrances be made thereto in writing, signed by at least twelve freeholders, the court may proceed to vacate such road, or any part thereof, at the cost of the petitioners; but if a remonstrance thereto in writing, signed by at least twelve freeholders, residents of such township or townships, be filed, and the court after considering the same shall decide that it is just to vacate such road, or any part thereof, against the vacation of which the remonstrance was filed, the costs shall be paid by the parties remonstrating, and the original costs and damages for opening such vacated road shall be paid by the petitioners to those who paid the same; provided, that if five years have elapsed since the original opening of the same no such reimbursement shall be made."

You will note in paragraph 1 of this section that it is required that the petition required to be filed "shall be publicly read on the first day of the term at which it is presented.* * *" The term at which the petition is required to be read is on the first day of the regular term. The nature of an adjourned term being but a continuation of the previous or regular term is such that it appears

Hon. Edwin F. Brady.

clear that the first day of the term could only refer to a regular term. In the case of *Harris v. Gest*, 4 Ohio State Reports 473, the court said:

"They (the courts) have an inherent power to adjourn to a more distant day * * *. When this power is exercised, the sitting after the adjournment is a prolongation of the regular term, and, in contemplation of law, there is but one term".

The section quoted above then provides "the matter (shall be) continued without further proceedings until the next term." The section then specifies that notice of the filing of the aforesaid petition be posted at least twenty days before "the first day of the next term of court, * * *" "and at the next regular term the same shall again be publicly read on the first day thereof." You will note that the "term" referred to in paragraph 1 of this section as the term to which the matter shall be continued is the same "term" as referred to in paragraph 2 as the next regular term when the petition shall again be publicly read.

To illustrate the foregoing with an example we may point out that the petition required to be submitted under the section in question could be publicly read on the first Monday in May which is the first day of the regular term. Notices must then be posted at least twenty days before the first Monday in August, and at the next regular term following the May term, which would be the first Monday in August, the petition shall again be publicly read and if no remonstrances be made thereto in writing, signed by at least twelve freeholders, the court may proceed to vacate such road if the court has followed all the other procedure required by the statute.

As intimated in your letter, the terms of the county court are fixed by section 49.170 RSMo 1949, in the following words:

"Four terms of the county court shall be held in each county annually, at the place of holding courts therein, commencing on the first Mondays in February, May, August and November. The county courts may alter the times for holding their stated terms, giving notice thereof in such manner as to them shall seem expedient; provided, that in counties now containing or that may hereafter contain seventy-five thousand or more inhabitants, and where county courts are now or may hereafter be held at more places than one and at other places than the county seat, the terms of said court shall be held monthly and alternately at the county seat and such other place as may be provided for the holding of such court, and each monthly term shall commence on the first Monday in each month."

Hon. Edwin F. Brady.

It is also provided, by section 49.200, that the county court may hold "adjourned terms." Said section reads as follows:

"Each county court may hold adjourned terms whenever it may become necessary for the transaction of its business."

Your next question is: Does the statute require that persons residing in the district whose lands are crossed or touched by the road sought to be vacated be served personally with notice that such petition has been filed if they have signed the petition making application for the vacation of such road?

The statute quoted supra is clear and unambiguous wherein it states:

"Notice of the filing of such petition and of the road sought to be vacated shall be posted up in not less than three public places in such townships * * * and a copy of the same shall be personally served on all the persons residing in said district whose lands are crossed or touched by the road proposed to be vacated in the same manner as other notices are required to be served by law."

I find nothing in the statute which would indicate that notice should not be given to one who has signed the petition simply because he is one of the petitioners. Notice as expressly required by the statute should be served on those persons residing in said districts whose lands are crossed or touched by the road proposed to be vacated.

CONCLUSION.

A petition making application to the county court for the vacation of a road under section 228.110 RSMo 1949, should be publicly read on the first day of the regular term at which it is presented, and the matter continued without further proceedings until the next regular term. At the aforementioned next regular term the said petition shall again be publicly read on the first day thereof.


Notice of filing the petition and the road sought to be vacated shall be personally served on all the persons residing in the district whose lands are crossed or touched by the road proposed to be vacated in the same manner as other notices are required to be served by law.

Respectfully submitted,

JEM.ld

JOHN E. MILLS
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney-General

TOWNSHIPS:

Townships may anticipate revenue and issue warrants which warrants shall bear interest.

April 24, 1951

4-25-51



Honorable C. Dudley Brandom
Prosecuting Attorney of
Daviess County
Gallatin, Missouri

Dear Sir:

This is in reply to your request for an opinion from this department which request reads as follows:

"Daviess County at the November election voted to revert to township organization form of county government (from county organization form of county government) and the various townships have held elections for their township board members the last part of March. These board members are now qualifying and posting bonds and desiring to start functioning as townships. The following questions have arisen in reference thereto on which we would like to obtain an official opinion of your office:

"Do townships or township boards have the right to anticipate revenue and issue protested warrants for a percentage of their anticipated revenue? If so, what is that percentage?"

Section 65.260, RSMo 1949, relating to the powers of townships is as follows:

"Each township, as a body corporate, shall have power and capacity:

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"(1) To sue and be sued, in the manner provided by the laws of this state;

"(2) To purchase and hold real estate within its own limits for the use of its inhabitants, subject to the power of the general assembly;

"(3) To make such contracts, purchase and hold personal property, and so much thereof as may be necessary to the exercise of its corporate or administrative powers;

"(4) To make such orders for the disposition, regulation or use of its corporate property as may be conducive to the interest of the inhabitants thereof;

"(5) To purchase at any public sale, for the use of said townships, any real estate which may be necessary to secure any debt to said township, or the inhabitants thereof, in their corporate capacity, and to dispose of the same."

Section 65.340, RSMo 1949, provides:

"When any claim or account, or any part thereof, shall be allowed by the township board of directors, they shall draw an order upon the township trustee in favor of the claimant for the amount so allowed - said order to be signed by the president of said board, and attested by the township clerk and delivered to said claimant."

Section 65.270, RSMo 1949, provides:

"No township shall possess any corporate powers, except such as are enumerated or granted by this chapter, or shall be especially given by law, or shall be necessary to the exercise of the powers so enumerated or granted."

(Emphasis ours.)

In view of the above statutory provisions it is our opinion that a township board vested with the power to discharge enumerated township functions may anticipate revenue and issue warrants. However, this authority is limited by Section 26(a), Article VI, Missouri Constitution 1945, which provides as follows:

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"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this constitution."

In the case of *Hawkins v. Cox*, 334 Mo. 640, the court in discussing this constitutional provision said at l. c. 649:

"The plain meaning of this constitutional provision is that any such municipal corporation may spend or contract to spend (become indebted) 'in any (calendar) year the income and revenue provided for such year', but beyond that it cannot go in creating a debt for any purpose or in any manner, except by consent of two-thirds of the voters. This was so held in *Book v. Earl*, 87 Mo. 246, where the Court said: 'The contracting of a debt in the future by a county in any manner or for any purpose in any one year exceeding the revenue which the tax authorized to be imposed would bring into the treasury for county purposes for such year, unless expressly authorized to do so by the assent of two-thirds of the voters' is prohibited."

In the case of *Watson v. Kerr*, 279 S.W. 692, the court in speaking on the same subject said:

"But in construing the constitutional provision just quoted we have repeatedly held that an indebtedness is not invalid merely because it appears at the end of the year in which it was created that the aggregate indebtedness incurred by the county during that year exceeded the revenue actually collected. If at the time of its creation the indebtedness is within the income which may reasonably be anticipated, it is valid."

You have asked the question whether or not a township board may issue protested warrants. We assume that you are interested in finding out whether the township board may issue warrants which will be protested so as to bear interest.

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Section 408.020, RSMo 1949, provides:

"Creditors shall be allowed to receive interest at the rate of six per cent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made."

To the effect that this section is applicable to township warrants we refer you to the case of Robbins v. Lincoln County Court, 3 Mo. 57, where it was contended that a similar section referred only to individual debtors. In passing on this question the court said:

"* * * But the words of the act are extensive enough to embrace all persons, and bodies, capable of owing money by bond, bill, promissory note, or other instrument in writing. By law the county is able to buy and sell certain things, to contract and be contracted with, and a County Court is by law expressly required to audit and allow all demands against the county, and to draw a warrant on the treasury for the amount allowed; here there is an instrument in writing, which shows money is due, but we are clear that the warrant must be presented at the treasury for payment, and payment refused, before any interest arises; that has been done in this case. * * *"

It is noted that the statutes governing township organizations make no provision for the payment of interest upon township warrants. However, we believe that this omission to so provide is governed by the reasoning of the court found in the case of Isenhour v. Barton County, 190 Mo. 163, at page 177:

"It has already been pointed out that the statutes relating to county warrants make no provision whatever for the payment of interest thereon, but that this court has held that they do bear interest and that the general statute in reference to interest is as applicable to such warrants or the debts they evidence, as to any other character of debts. The Legislature

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evidently intended that such should be the case, and the failure to provide specially for interest was not a mere casus omissus. For ever since 1865 there has been a provision upon the statutes of this State in reference to city warrants, similar to the provisions herein set out as to county warrants and the protesting of the same when there was no money to pay them, except that it was further provided that such warrants so protested should draw legal interest until funds for the payment thereof should be set apart therefor. * * *

We are therefore of the opinion that the legislature intended that the general statute in reference to interest should govern. The general interest statute above quoted contains no provision or regulation as to the demand or the formality of refusal of payment. Therefore a formal protest is not required and the interest starts to run after demand and refusal of payment.

Although a county is prohibited by statute from incurring a principal indebtedness beyond a specified percentage of the anticipated revenue for the current year, there is no similar provision relating to townships. Therefore we are of the opinion that a township may, subject to Section 26(a), Article VI, Missouri Constitution, incur indebtedness up to the full amount of the anticipated revenue. A debt in its generally accepted meaning denotes principal and interest. Therefore it would be difficult without reference to particular circumstances to formulate a general rule as to the percentage of anticipated revenue that warrants may be issued upon, since the interest must be computed to determine the total indebtedness which may be incurred and which is limited by the above quoted constitutional provision.


CONCLUSION

Therefore it is the opinion of this department that township organizations may anticipate revenue and issue warrants for necessary expenses subject to the limitation that such debts (principal and interest) incurred shall not exceed the revenue reasonably anticipated for the current year and it is our further opinion that warrants so issued would bear interest under the general interest statute.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:


J.E. TAYLOR
Attorney General

OFFICERS: County treasurer of county adopting township
COUNTIES: organization to receive salary of not less
FEES AND SALARIES: than \$100 per month. Receives no compensation
as ex officio collector where county collector
has portion of term of office remaining.

June 7, 1951



6-8-51

Honorable C. Dudley Brandom
Prosecuting Attorney
Daviess County
Gallatin, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department, which, in part, reads:

"Daviess County has reverted from County Organization form of County Government to Township Organization form of County Government. Under our present population of 11,096 persons, the County Treasurer under County Organization form of government would be entitled to receive \$125.00 salary. The same Treasurer under Township Organization may receive not less than \$100.00 salary, said salary to be fixed by the County Court. In addition to this, ordinarily the Township Organization County Treasurer receives a percentage of the tax collections, as provided in Section 54.320; but as our County Collector will collect all taxes for the next four years, none of this revenue and none of the responsibility and duties for such collection goes through the Treasurer's Office.

"Consequently, can you inform me, on behalf of the County Court, the amount the County Court is authorized to pay the Township Organization County Treasurer?"

Honorable C. Dudley Brandom

In reading your letter it appears that Daviess County is a county possessing township organization form of county government. It has been recently organized under this form of government. The question which you have presented concerns the amount of compensation that the County Court of Daviess County can now pay the county treasurer who was elected to that office prior to the time that the county was organized under township form of government.

In considering your question certain appropriate sections of the Revised Statutes of 1949 will be cited.

Section 65.030 provides for the manner of petitioning for and voting on the proposition of adopting township organization form of government in counties of the third and fourth class. That section further provides as follows:

"If a majority of the electors voting upon the proposition shall vote for the adoption thereof the township organization form of county government shall be declared to have been adopted; provided, that counties adopting township organization shall be subject to and governed by the provisions of the law relating to township organization on and after the last Tuesday in March next succeeding the election at which such township organization was adopted."

From the above-quoted portion of the statute it appears that counties adopting township organization become subject to and are governed by all provisions of law relating to township organization as of the time stated in the statute. Consequently, we must look to other statutes relating to township organization counties which also provide for the manner of paying the county treasurers of said counties, for it is such statutes which shall govern in determining the compensation of a county treasurer in a county under township organization.

Section 54.280 provides that the county treasurer of counties having adopted township organization shall also be the ex officio collector. However, in regard to a county which has adopted township organization and the county collector elected prior to the adoption of said form of government still has some of his term remaining, the county treasurer of such county would not immediately perform the duties imposed upon him as ex officio collector, for Section 65.600, in part, provides:

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"In any county in this state which may hereafter adopt township organization, the person holding the office of the collector of the revenue and the person holding the office of county assessor in such county, at the time in March when township organization becomes effective in such county, shall continue to hold his office and exercise all the functions and receive all the fees and emoluments thereof until the time at which his term of office would have expired had such county not adopted township organization, and, except as herein otherwise provided, he shall perform the same duties and be subject to the same requirements and liabilities as in counties not under township organization."

Section 54.320, which provides for the compensation of the county treasurer and ex officio collector in counties adopting township organization, reads as follows:

"The county treasurer in counties of the third class adopting township organization shall be allowed a salary of not less than one hundred dollars per month by the county court to be paid as at present provided by law; the ex officio collector for collecting and paying over the same shall be allowed a commission of three per cent on all corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, and two per cent on all delinquent taxes, which shall be taxed as costs against such delinquents and collected as other taxes; provided, he shall receive nothing for paying over money to his successor in office."

It appears that the above section is severable in providing for the compensation of the treasurer and of the ex officio collector. That is to say, the statute first provides for the minimum compensation that the county court is authorized to pay the county treasurer in counties adopting township organization, the same being not less than one hundred dollars per month. Thereafter, the statute provides for the manner of compensating the ex officio collector of counties adopting township organization, and it is noted that the ex officio collector receiving

Honorable C. Dudley Brandom

compensation is dependent upon his collecting and paying over certain taxes specified in the statute.

However, in counties such as Daviess County which have adopted township organization, and where the county collector elected prior to the adoption of said form of government still has a portion of his term of office remaining, Section 54.320, supra, must be harmoniously construed with Section 65.600, supra, which also has application to the performance of duties and the payment of compensation to the collector of a county under township organization. In this connection it has been stated by the Supreme Court of Missouri in State v. Naylor, 40 S.W. (2d) 1079, 1.c. 1084:

"We do not lose sight of the fact that all statutes that may be applicable must be read and construed together and, if possible, harmonized. * * *"

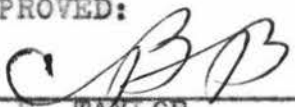
Therefore, construing together Sections 54.320 and 65.600, supra, the County Treasurer of Daviess County would not now receive any compensation as ex officio collector. However, as Treasurer of Daviess County he would be entitled to receive compensation in the manner provided for by statute relating to counties under township organization, to wit, Section 54.320. Thus, it would follow that the County Court of Daviess County would be entitled to pay to the county treasurer of said county a salary of not less than one hundred dollars per month.

CONCLUSION

In the premises, it is the opinion of this department that the County Treasurer of Daviess County should be compensated in the manner provided by law for counties under township organization and, therefore, should be paid by the county court a salary of not less than one hundred dollars per month. It is further concluded that the County Treasurer of Daviess County is not now entitled to receive any compensation as ex officio collector inasmuch as the county collector of said county, who was elected prior to the adoption of township organization in the county, still has a portion of his term of office remaining and by law performs the duty of collecting the taxes and is entitled to the emoluments thereof until the time his term of office expires.

Respectfully submitted,

APPROVED:


J. E. TAYLOR
Attorney General

RICHARD F. THOMPSON
Assistant Attorney General

RFT:ml

COUNTY WELFARE OFFICE: The county court is under no obligations to
: furnish quarters or give support to the
COUNTY COURTS: : county welfare office but may make con-
: tributions for the maintenance of such of-
: fice.

September 18, 1951

9-18-51

Honorable Edwin F. Brady
Prosecuting Attorney
Benton County
Warsaw, Missouri



Dear Mr. Brady:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"It is requested that I be informed what the obligation, if any, of the county court is to furnish money, services or quarters for a county welfare office. It is noted that section 207.060 empowers the director of welfare to accept such money, services or quarters.

"It is further requested that I be informed what the authority, if any, of the county court is to furnish money, services or quarters for a county welfare office. It is noted that section 49.510 requires the county to provide offices or space for the officers of the county and maintain, furnish and equip said offices with stationery, supplies, equipment, appliances and furniture.

"In other words, what is the county court supposed to do toward the support of the county welfare office?"

Section 207.060, RSMo 1949, is as follows:

"1. The director of welfare shall establish a county office in every county, which shall be in the charge of a county

welfare director who shall have been a resident of the state of Missouri for a period of at least five years and whose salary shall be paid from funds appropriated for the division of welfare.

"2. For the purpose of establishing and maintaining county offices, or carrying out any of the duties of the division of welfare, the director of welfare may enter into agreements with any political subdivision of this state, and as a part of such agreement, may accept moneys, services, or quarters as a contribution toward the support and maintenance of such county offices. Any funds so received shall be payable to the state collector of revenue and deposited in the proper special account in the state treasury, and become and be a part of state funds appropriated for the use of the division of welfare.

"3. Other employees in the county offices shall be employed with due regard to the population of the county, existing conditions and purpose to be accomplished; and shall be residents of the county where qualified under the regulations of the division, and shall be paid as are other employees of the division of welfare."

This statute makes it the duty of the state director of welfare to establish and maintain an office in every county in the state, and he is authorized to accept funds, services, or quarters as a contribution from any political subdivision of the state. The county is under no obligations to support the program. But the county court may in its discretion contribute moneys, services, or office space in order to assist the division of welfare in carrying on its work.

Section 49.510, RSMo 1949, declares it to be the duty of the county to provide offices for the officers of the county. This mandate, however, applies only to the regular county offices. The welfare office in fact is not a county office. It is simply a branch office of a state agency and

is not included in this section of the law.

The Supreme Court of Arkansas supported this view in the case of McDaniel vs. Moore, 118 S.W. (2d) 272. In the course of that opinion, on page 275, the court said:

"We are of the opinion that the trial court was correct in holding that county departments of Public Welfare are mere geographical subdivisions of a single State Department of Public Welfare, and that county departments are mere agencies of the State Department. When the whole Welfare Act is considered, this conclusion is inescapable. * * * ."

The meaning of "county officers," as defined by the Supreme Court of Missouri, seems to be in accord with this principle. In the case of State ex rel. vs. Imel, 242 Mo. 293, 1.c. 300, the court said:


"The words 'county officers' have two well defined meanings. In their most general sense, they apply to officers whose territorial jurisdiction is co-extensive with the county for which they are elected or appointed. In a more precise and restricted sense, those words mean officers 'by whom the county performs its usual political functions, its function of government.' (Sheboygan County v. Parker, 70 U.S. 93, 1.c. 96.)"

CONCLUSION

It is the opinion of this office that the county court is under no obligations to furnish quarters or give support in any way to the county welfare office. The court may in its discretion, however, contribute funds, services, or quarters toward the support and maintenance of such office.

Respectfully submitted,

APPROVED:


J. E. TAYLOR
Attorney General

B. A. TAYLOR
Assistant Attorney General

SOCIAL SECURITY:
ST. LOUIS BOARD OF
ELECTION COMMISSIONERS:

Members of the Board of Election Commissioners and its employees for the purpose of Senate Bill No. 3, would be covered by an agreement entered into between the City of St. Louis and the state agency extending the benefits of the federal old-age and survivors insurance to its employees.

June 25, 1951

6-25-51

Mr. Paul C. Calcaterra, Chairman
Board of Election Commissioners
for the City of St. Louis
208 South 12th Boulevard 2
St. Louis, Missouri



Dear Sir:

You recently requested an opinion of this department which request reads as follows:

"Please let us know how the employees of this Board can be covered by the State Social Security Act recently passed by the 66th General Assembly.

"The City of St. Louis is preparing a bill to present to the Board of Aldermen which will make such Social Security law applicable to City employees.

"Although the members of the Board are appointed by the Governor, we, and our employees, are paid by the City of St. Louis. We have asked the City Counselor's office our status in the matter and it was suggested that we secure an opinion from you as to how we may become eligible for Social Security benefits."

Your question requires an interpretation of Senate Committee Substitute for Senate Bill No. 3 of the 66th General Assembly, with regard to the status of the Board of Election Commissioners. The

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necessity of such determination is obvious in view of the fact that the bill provides that employees of the State, including elective and appointive officers and members of the General Assembly shall be covered under the old-age and survivors insurance provisions of Title II of the Federal Social Security Act, and employees of political subdivisions or instrumentalities of the state or subdivision may be covered. This coverage is affected by the agreement entered into between the state agency and the Federal Security Administrator.

Section 4, Subsection 1 of this bill provides in part as follows:

"Every employee of the state whose services are covered by an agreement entered into under section 2 shall be required to pay for the period of such coverage into the contribution fund established by section 6 of this act, contributions with respect to wages equal to the amount of tax which would be imposed by section 1400 of the Federal Insurance Contributions Act, * * *."

Subsection 2 of this section provides in part:

"The contributions imposed by this section shall be collected by the state by deducting the amount of the contributions from wages paid, * * *."

In view of the above cited section we do not believe that the term employee as used therein and defined in Subsection 2 of Section 1, to mean "elective or appointive officers and employees of the state, including members of the General Assembly," was ever intended to embrace those individuals who might otherwise fall within this definition but who are not paid by the State. In other words, unless an individual is receiving his remuneration from the State, he is not covered by the agreement entered into with the Federal Security Administrator, as an employee of the State, for the State would have no way of collecting the contributions imposed by this act. Any other conclusion would of necessity render Subsection 2 of Section 4 inoperative and superfluous. Such a construction cannot be sanctioned in view of the well recognized rule stated in the case of Logan v. State Highway Commission, 330 Mo. 1213, 1. c. 1219:

"The two sections of the statute should be read and construed together. In construing

Mr. Paul C. Calcaterra

a statute the court, must, if possible, give effect to the whole and every part thereof, provided the interpretation reached is reasonable and not in conflict with the legislative intent. * * *"

Section 118.130, RSMo 1949, provides that the salaries of the election commissioners and employees of the board be paid by the city. Therefore, we are of the opinion that the members of the board and employees are not covered under the old-age and survivors insurance provisions of Title II of the Federal Social Security Act as employees of the State.

The legislature has clearly distinguished between employees of the State and employees of a political subdivision. Section 5, Subsection 1, provides in part:

"Each political subdivision of the state and each instrumentality of the state or of a political subdivision may submit for approval by the state agency a plan for extending the benefits of Title 2 of the Social Security Act to its employees, and are hereby authorized to, by proper ordinance or resolution, enter into and ratify any such agreement upon its approval as aforesaid. * * *"

(Underscoring ours.)

Again considering the term employees as used in this section as including elective and appointive officers and employees of the political subdivision, we could not question but that the county clerk of a county being a political subdivision was intended as an officer or employee of such subdivision. The Board of Election Commissioners are charged with the same duties within the City of St. Louis in regard to elections as a county clerk of a county. The duties of the board are confined solely to the geographical boundaries of the city and their remuneration is received from the city. Therefore, we are of the opinion that for the purpose of Senate Bill No. 3, they may be considered as officers or employees of the city. We do not deem it necessary to distinguish the election commissioners as either officers or employees since in either event they would be covered by an agreement entered into between the governing body of the city and the state agency extending the benefits of the federal old-age and survivors insurance system to its elective or appointive officers and employees.

Mr. Paul C. Calcaterra


CONCLUSION

Therefore, it is the opinion of this department that the Board of Election Commissioners and its employees for the purpose of Senate Bill No. 3, would be covered by an agreement entered into between the City of St. Louis and the state agency extending the benefits of the federal old-age and survivors insurance to its employees.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

DDG:hr

GENERAL ASSEMBLY: Board of Election Commissioners of
SENATORS: St. Louis City must redistrict
REPRESENTATIVES: senatorial and representative
LEGISLATIVE DISTRICTS: districts. Districts may have same
boundaries as at present.

August 29, 1951

9-4-51

Mr. Paul C. Calcaterra
Chairman
Board of Election Commissioners
City of St. Louis
208 South Twelfth Boulevard
St. Louis 2, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department, and reading as follows:

"As you know, under the recent re-apportionment of State Senatorial and Representative Districts the City of St. Louis retains its present quota of seven Senatorial Districts and eighteen Representative Districts.

"We are now confronted with two possible courses of action, namely whether to redistrict the City into new districts, or merely re-certify existing lines. To help us reach a decision we would appreciate your clarification of the law.

"Section 7 of Article III of the Constitution of Missouri and Section 22.050, R.S. 1949, contemplate that the population of no district shall vary from the quotient provided by more than one-fourth thereof. The population figures furnished us by the United States Census Bureau show that no district, as now constituted, varies by more than one-fourth from the quotient. Are we, therefore, prohibited from drawing new lines,

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or may we do so at our discretion so as to more nearly equalize the population of the districts into compact territory?

"In the event of a ruling that we do not have authority to draw new lines under the circumstances, would reaffirmation of existing boundaries be sufficient compliance with the provisions of the law, particularly Section 22.030?"

Section 7, Article III of the Constitution of Missouri, provides as follows:

"Within sixty days after this Constitution takes effect, and thereafter within sixty days after the population of the state is reported to the President for each decennial census of the United States, the state committee of each of the two political parties casting the highest vote for governor at the last preceding election shall submit to the governor a list of ten persons, and within thirty days thereafter the governor shall appoint a commission of ten members, five from each list, to reapportion the thirty-four senators and the numbers of their districts among the counties of the state. If either of the party committees fail to submit a list within such time the governor shall appoint five members of his own choice from the party of such committee. Each member of the commission shall receive fifteen dollars a day, but not more than one thousand dollars. The commission shall reapportion the senators by dividing the population of the state by the number thirty-four, and the population of no district shall vary from the quotient by more than one-fourth thereof. The commission shall file with the secretary of state a full statement of the numbers of the districts and the counties included in the districts, and no statement shall be valid unless approved by seven members. After the statement is filed senators shall be elected according to such districts until a re-apportionment is made as herein provided, except that if the statement is not

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filed within six months of the time fixed for the appointment of any such commission it shall stand discharged and the senators to be elected at the next election shall be elected from the state at large, following which a new commission shall be appointed in like manner and with like effect. No such reapportionment shall be subject to the referendum." (Emphasis ours.)

Section 8, Article III, Constitution of Missouri, provides as follows:

"When any county is entitled to more than one senator the county court, and in the City of St. Louis the body authorized to establish election precincts, shall divide the county into districts of contiguous territory, as compact and nearly equal in population as may be, in each of which one senator shall be elected."

Section 22.020, RSMo 1949, provides as follows:

"Within ten days after the effective date of sections 22.020 and 22.030, the secretary of state shall certify to the county courts of the various counties and to the board of election commissioners in the city of St. Louis, the number of districts and the counties included in the districts and the number of districts in counties and in the city of St. Louis, as contained in the statement filed with the secretary of state by the commission provided for in section 7 of article III of the constitution; and thereafter, within sixty days after any subsequent commission acting under authority of said section 7 of article III of the constitution has filed its statement with the secretary of state, the secretary of state shall certify to said county courts and to said board, the number of districts and the counties included in the districts and the number of districts in counties and in the city of St. Louis, as contained in such statement filed by such commission." (Emphasis ours.)

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Section 22.030, RSMo 1949, provides as follows:

"On or before March first following the certification by the secretary of state as provided in section 22.020, the board of election commissioners of the city of St. Louis and the county courts of those counties which by said report are entitled to more than one senator, shall certify to the secretary of state a complete statement of the senatorial districts established therein; and in the event that said board of election commissioners of the city of St. Louis or the county courts of such counties fail to comply with this section, the number of senators in such districts to be elected at the next election shall be nominated and elected by the electorate from the state at large; provided the persons so nominated and elected shall reside in the city or the county entitled to such senators." (Emphasis ours.)

From the above-quoted provisions of the Constitution and the statutes it is evident that within sixty days after every decennial census taken in the United States the Secretary of State certifies to any county entitled to more than one senator and to the city of St. Louis the number of senators which such county or the city of St. Louis is entitled to. It is provided in Section 22.030, supra, that the Board of Election Commissioners of the City of St. Louis shall, on or before March 1, following such certifications by the Secretary of State, certify to the Secretary of State a complete statement of the senatorial districts established therein. This duty of establishing senatorial districts is one then that must be performed by the Board of Election Commissioners of the City of St. Louis after every decennial census when the Secretary of State certifies to such Board the number of senators to which such city is entitled.

The determination of the boundaries of such districts is a matter left in the discretion of the Commission, subject to the constitutional provision that no senatorial district shall vary more than one fourth from the quotient obtained by dividing the population of the state by thirty-four. The Board, if it so desires, in redistricting may determine that the new senatorial districts should have the same boundaries as the present senatorial districts. However, new districts must be created in order to comply with the statute. Section 2, Article III of the Constitution of Missouri, provides as follows:

Mr. Paul C. Calcaterra

"The house of representatives shall consist of members elected at each general election and apportioned in the following manner. The ratio of representation shall be the whole number of the inhabitants of the state divided by the number of two hundred. Each county having one ratio, or less, shall elect one representative; each county having two and a half times the ratio shall elect two representatives; each county having four times the ratio shall elect three representatives; each county having six times the ratio shall elect four representatives, and so on above that number giving an additional member for every two and a half additional ratios. On the taking of each decennial census of the United States, the secretary of state shall forthwith certify to the county courts, and to the body authorized to establish election precincts in the City of St. Louis, the number of representatives to be elected in the respective counties." (Emphasis ours.)

Section 3, Article III of the Constitution of Missouri, provides as follows:

"When any county is entitled to more than one representative, the county court, and in the City of St. Louis the body authorized to establish election precincts, shall divide the county into districts of contiguous territory, as compact and nearly equal in population as may be, in each of which one representative shall be elected."

Section 22.050, RSMo 1949, provides as follows:

"Within ten days after the effective date of this section, and thereafter within thirty days after the taking of each decennial census of the United States, the secretary of state shall forthwith certify to the county courts of the several counties named in section 22.040, which are entitled by this apportionment to two or more representatives, and to the board of election commissioners in the city of St. Louis, the number of representatives to be elected in the respective counties and in the city of

Mr. Paul C. Calcaterra

St. Louis. Within twenty days after the effective date of this section and thereafter within sixty days after being officially so informed by the secretary of state, the county court of the several counties and the board of election commissioners of St. Louis shall divide their respective counties and said city into representative districts, of compact and contiguous territory corresponding in number to the representatives to which such county or city is entitled, and in population as nearly equal as may be, in each one of which the qualified voters shall elect one representative, who shall be a resident of such district. After each decennial census such districts may be altered one time as public convenience requires. On its own motion, or on petition of five hundred or more qualified voters of the county or of said city, the county court of such counties or the board of election commissioners in the city of St. Louis, shall hold a public hearing to determine the necessity for altering any such districts. The population of the county or of said city shall be divided by the number of representative districts in the county or said city, and proof at such hearing that by the last decennial census of the United States taken since the last districting was made the population of any one district varies from the quotient by more than one-fourth thereof, shall be prima facie evidence that public convenience requires that such a redistricting be made. If the county courts or board of election commissioners of said city shall find that public convenience requires such redistricting to be made, they shall by an order entered of record, redistrict such county or city into representative districts in the manner prescribed by the constitution for such districts. Within thirty days after the effective date of this section, and thereafter within thirty days after making any districting, the county court or board of election commissioners in said city shall file the divisions or alteration and the names and descriptions of the districts with the county clerk of said counties or the circuit clerk in said city, and

Mr. Paul C. Calcaterra

certify the same to the secretary of state."ⁿ (Emphasis ours.)

Under the above-quoted constitutional and statutory provisions it is the duty of the Secretary of State to certify, within thirty days after the taking of each decennial census of the United States, to the Board of Election Commissioners of the City of St. Louis the number of representatives to be elected in such city. It then becomes the duty of the Board of Election Commissioners, within sixty days after being so notified, to divide such city into the number of representative districts to which such city is entitled. The Board may, in redistricting after each census, use the same boundaries in the new districts that the present districts have, but such Board must create new districts after every decennial census. The provisions of Section 22.050, supra, relative to altering representative districts which have been established, apply only after the redistricting provided for after each decennial census has been completed.

CONCLUSION

It is the opinion of this department that the Board of Election Commissioners of the City of St. Louis must redistrict the city of St. Louis into senatorial districts on or before March 1, following the certification by the Secretary of State after each decennial census.

It is the further opinion of this department that the Board of Election Commissioners of the City of St. Louis must redistrict the city of St. Louis into representative districts within sixty days after receiving the certificate of the Secretary of State as to the number of representatives to which such city is entitled after each decennial census.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:ml

66th General Assembly
PENSIONS: House Bills 97 and 98, relating to blind
BLIND PENSIONS: pensions, do not conflict with the Federal
SOCIAL SECURITY: Social Security Act.

March 5, 1951

Mr. Proctor N. Carter, Director
Division of Welfare
Department of Public Health & Welfare
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads:

"House Bill 98, introduced by Representatives Houtchens, Wallace and Snyder, provides for aid to the needy blind and was introduced for the purpose of establishing a federal-state program of aid to blind persons who would qualify under the provisions of the bill.

"I would appreciate your reviewing House Bill 98 and receiving an opinion from you as to whether or not this bill conforms with the federal law relative to requirements of state plans for aid to the blind, Title X, Federal Social Security Act, as amended by the 1950 amendments."

Your request is upon a matter which ultimately must come before the Federal Social Security Board for consideration and receive said Board's approval or rejection for Federal aid for blind to the State of Missouri.

As we understand your request, the State of Missouri has never heretofore received any Federal participation in the payment of blind pensions under our present state law providing for pensions to the blind. However, there now has been introduced in the 66th General Assembly House Bill No. 98, providing for aid to the blind which is an entire new law not specifically repealing any law of this state now in full force and effect.

Presently there is no state plan drafted for aid to the blind, but you desire to know if the Federal Social Security

Mr. Proctor N. Carter

Act conflicts with House Bill No. 98 pending before the General Assembly and Chapter 209, RSMo 1949, which chapter grants blind pensions to qualified persons in this state, so as to prevent the Social Security Board from participating in payment of aid to the blind persons qualified to receive same in this state.

While we will have in this state, assuming that House Bill No. 98 is passed and approved, two laws, one dealing with payment of pensions to the blind, the other aid to the blind, both are administered by one and the same single state agency, the Division of Welfare under the Department of Public Health and Welfare, and there is no conflict whatsoever between the two laws. No person can obtain benefits under both. The present law known as Chapter 209 RSMo 1949, authorizes an outright blind pension to persons qualifying under the provisions of said chapter, which pension is not necessarily based upon need. The new proposed law, House Bill No. 98, is for aid to the blind and is based entirely upon need. Furthermore, House Bill No. 98 specifically provides that one disqualifying for aid to the blind may apply for a blind pension under Chapter 209, RSMo 1949. House Bill No. 97, which attempts to amend Chapter 209, supra, specifically provides that no person shall receive pensions for blind until first being rejected for aid to the blind. This will place everyone qualified under the aid for blind program in this state which payments the Federal government may participate in and keep them off the blind pension rolls in this state, which payments are not participated in by the Federal government. Furthermore, said bill requires the Division of Welfare to continue payments of blind pensions to persons on the roll just until the administrators have had time to determine if they are eligible under the aid for blind program.

In House Bill No. 98, supra, the General Assembly has expressly declared the legislative intent to grant pensions to the blind under Chapter 209, supra, and aid to blind is provided in House Bill No. 98 and defines the words "pensioning of deserving blind" as used in any law in Missouri to include aid to the blind. While this interpretation under the rules of construction is not conclusive, it does have some legal significance and will be given consideration in construing said provision. Also the bill provides that the payment of benefits to recipients of aid to the blind in this state shall be made monthly out of the blind pension fund in the same manner as is now provided for recipients of pension to the blind. (Section 209.090, RSMo 1949, and amendments thereto.)

Mr. Proctor N. Carter

The Federal Social Security Act and amendments thereto, providing for participation in the payment of aid to the blind and pensions to the blind to various states, contain the following requirements:

Section 1202, Subchapter X, Title 42, page 648, USCA, provides for Federal participation to states for aid to the blind when said state complies with the provisions contained in Subchapter X. Section 1202, supra, requires a state plan for aid to the blind and said plan must be as follows:

1. It must be in full force and effect in the whole state.
2. There must be some financial participation by the state.
3. There must be a single state agency administering said program.
4. There must be an adequate appeal provision.
5. Personnel must be employed on merit basis.
6. The administrative agency must submit to Federal Social Security Board any reports the Board deems necessary.
7. No individual may receive aid for blind when receiving old age assistance.
8. In passing upon need, the administrative agency must take into consideration any other income and resources of the applicant.
9. As amended, requires the state law to restrict the use and disclosure of information concerning applicants and recipients solely to purposes directly connected with the administration of the act and program.
10. As amended, provides for, in determining blindness, an examination by a physician skilled in diseases of the eye or by an optometrist.
11. As amended, as of July 1, 1951, all persons wishing to apply for aid to the blind may be afforded an opportunity to do so.
12. As amended, provides that as of July 1, 1953, if the plan includes the payment to individuals in private or public

Mr. Proctor N. Carter

institutions that the Federal Social Security Board must approve said plan; and furthermore, that said plan must not disqualify persons as to residence and citizenship qualifications similar to those shown under Section 10, subsection (b)(1)(3).

House Bill No. 98 complies with all of the foregoing conditions and even goes further in some instances.

Under Section 1204 of the same Subchapter X, Social Security Act, it provides that the Federal Social Security Board may approve and then reject aid at any time thereafter it determines the state does not fully comply with all Federal laws and regulations dealing with aid to the blind.

We do not have for examination all the rules and regulations promulgated and adopted by the Federal Social Security Board, so we will be unable to pass upon any possible conflict between such rules and regulations and laws of the State of Missouri. However, such rules and regulations cannot go beyond the provisions of the Federal Social Security Act. Certainly if there is no conflict between the Federal and state act, no regulation of said Board should in any manner conflict with the state law relative to pensions and aid to the blind.

Section 1202(a) of Subchapter X, Title 42, USCA, as amended, provides for approval of state plan for aid to the blind for those states that did not on January 1, 1949, have such a plan, even though the state has not fully complied with the provisions of Clause (8) of Section 1202(a) of said Title.

Section 1203 of the same chapter and title as amended provides for quarterly payments to the state after certification has been made to the Secretary of the Treasury that the state has an approved plan for aid to the blind.

Section 1206, same subchapter and title, defines "aid to blind" for the purpose of said subchapter as money payments to or medical care in behalf of any type of remedial care, recognized under the state law in behalf of blind individuals who are needy, with certain exceptions contained therein.

As shown hereinabove, we have carefully examined the Federal statutes dealing with this subject and it appears that the proposed legislation in this state, namely House Bill No. 97 and House Bill No. 98, and our statutes now in full force

Mr. Proctor N. Carter

and effect, granting pensions to blind persons, fully complies with every requirement contained in the Federal statutes and amendments thereto for Federal participation in payments to the state for blind persons. While we have in fact a blind pension law in this state that the Federal government does not participate in any payments made thereunder, and no attempt is being made for such participation, if House Bill No. 98 is passed by the General Assembly and approved by the Governor, we will have in this state a law for aid to the blind in which the Federal Social Security Board may participate in the payments thereunder, there being no conflict between the two acts; and we are unable to see wherein the Federal Social Security Board, under the Federal Social Security Act hereinabove referred to, is in any manner prevented from approving a state plan for the payment of aid to the blind as contained in House Bill No. 98, pending before the 66th General Assembly of the State of Missouri.


CONCLUSION

Therefore, it is the opinion of this department that there is no conflict between Sections 1201 to 1206, inclusive, of Subchapter X, Title 42, USCA, of the Federal Social Security Act, as amended, and Chapter 209, RSMo 1949, House Bills Nos. 97 and 98, which bills await the approval or rejection of the 66th General Assembly of the State of Missouri; that under the foregoing laws and pending legislation, the Federal Social Security Board may, if it so desires, approve a state plan following the provisions of said laws and bills and thereby participate with the State of Missouri in payments made thereunder.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

ARH:VLM

BLIND PENSIONS:

Construing House Bill No. 97 and House Bill
No. 98, pending in the 66th General Assembly
of the State of Missouri.

DIVISION OF WELFARE:

April 30, 1951

5-1-51

Mr. Proctor N. Carter
Director, Division of Welfare
Department of Public Health & Welfare
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your request for an
official opinion which reads:

"A question has been raised as to whether
or not payment could be made to any blind
pensioner under the provisions of either
House Bill 97 or House Bill 98 in an
amount less than \$50 a month. I should
like for you to advise me whether, in
your opinion, it would be possible for
the Agency administering the law under
the terms of House Bill 97 and under the
provisions of House Bill 98 to pay a
grant of less than \$50 per month to a
person qualifying under either program.
The specific sections of these bills to
which I refer are: Section 209.040 of
House Bill 97 and Section 5 of House Bill
98.

"A further question which I would like
answered is, could an individual receiv-
ing old age assistance or permanent and
total disability aid in an amount less
than \$50 be considered as receiving aid
under a Federal-State program for aid to
the blind, as set forth in Line 17, Sec-
tion 209.040 of House Bill 97.

"In your opinion, could a blind person,
eligible and receiving benefits under
provisions of House Bill 97, be compelled
to accept some other type of aid, in lieu
of his pension, other than aid to the
blind as would be provided under the pro-
visions of House Bill 98.

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"House Bills 97 and 98 have passed the House of Representatives and hearings will probably be held on these bills in the Senate within the next ten days. Consequently, we need your opinion as early as possible."

We shall answer the questions in the order stated in your request. (1) Is it possible for the administrative agency (Division of Welfare) under proposed House Bill No. 97 and House Bill No. 98 pending in the 66th General Assembly to pay a grant of a less amount than \$50.00 to persons qualifying under either bill? (2) Can a recipient of old age assistance or permanent total disability in an amount of less than \$50.00 be considered as receiving aid under a Federal-State Program for aid to the blind as set forth in Line 17, Section 209.040 of House Bill No. 97? (3) Can a blind person who is eligible and actually receiving benefits under House Bill No. 97 be compelled to accept some other type of aid in lieu of said pension other than aid to the blind as provided under House Bill No. 98?

Your inquiry is for a construction of new proposed legislation, and we have found no court decision actually construing such provisions or any similar legislation. So, this is of first impression.

One of the cardinal rules of statutory construction is, if possible, to ascertain the legislative intent from the words used and give it that construction. See *Union Electric Co. v. Morris*, 222 S.W. (2d) 767, 359 Mo. 564.

House Bill No. 97, supra, amends the present blind pension law by increasing the present pension from \$40.00 to \$50.00, and further provides that such blind pension shall not be payable to a blind person unless such person has been declared ineligible to receive aid to the blind (as provided in proposed House Bill No. 98). However, any present recipients of a blind pension shall continue to receive same until such time as investigations have been made as to the eligibility of such recipients to receive aid to the blind under proposed House Bill No. 98.

Section 209.040, House Bill No. 97, reads:

"No person shall be entitled to a pension under this article who has vision, with or without proper adjusted glasses, greater

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than what is known as light perception. Light perception, as used in this section, means not more vision than is sufficient only to distinguish light from darkness and recognize the motion (not the form) of the hand of the examiner at a distance not greater than one foot from the eye. No person shall be entitled to receive a pension except upon a scientific vision test supported by the certificate of a competent oculist that such person does not possess vision greater than light perception. Every person passing the vision test and having the other qualifications provided in this article shall be entitled to receive a monthly pension of fifty dollars (\$50.00); provided, however, that pensions to the blind as provided herein shall not be payable to a blind person unless such person has been declared ineligible to receive aid to the blind under a federal-state program for aid to the blind; provided further, that the division of welfare shall continue the payment of blind pensions to persons now enrolled upon the blind pension rolls until investigations have been made as to the eligibility of such persons to receive aid to the blind."

Section 5 of House Bill No. 98 reads:

"The division of welfare shall, for the purpose of obtaining Federal financial participation in aid to the blind payments, prepare a budget taking into consideration the necessary expenses (in accordance with standards developed by the division of welfare) and the income and resources of the individual claiming aid to the blind. In preparing such budget the division of welfare shall disregard the first \$50.00 per month of earned income. Every person passing the vision test and having the other

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qualifications provided in this act shall be entitled to receive aid to the blind in the amount of \$50.00 monthly; provided, however, that if such person is found not to be in need and Federal financial participation in payments of aid to him cannot be obtained by the division of welfare under an approved state plan for aid to the blind, Title X of the Federal Social Security Act, as amended, aid to the blind shall not be granted. Any person disqualified to receive aid to the blind may apply for pension to the blind as provided in Chapter 209, Revised Statutes of Missouri, 1949."

The foregoing provision under House Bill No. 98, known as the aid to the blind bill, in clear and unmistakable language specifically provides that any person passing the vision test and having other necessary qualifications as provided therein shall be entitled to receive aid to the blind in an amount of \$50.00 per month. "Shall" is ordinarily construed by the courts, when used as herein, as mandatory and not discretionary. See State ex rel. Stevens v. Wurdeman, 246 S.W. 189, 295 Mo. 566. Considering the wording of said provision, the use of the word "shall" and decisions construing "shall" as mandatory, we consider it a mandate upon the administrative agency to pay the full \$50.00. Had the Legislature intended that applicants for blind pensions should receive a smaller amount than \$50.00, certainly it would have used some language indicating such intent. Section 5 further provides that however if such person is found to be in no need and Federal aid cannot be obtained under an approved state plan for aid to the blind under Title X as amended, he cannot receive aid to the blind under House Bill No. 98, but may then apply for a blind pension under Chapter 209, RSMo 1949. This merely means that if found to not be in need, then naturally no aid can be forthcoming from the Federal government under Title X, supra, as amended for the reason under the Federal Act, the Federal government can only participate with the states in such payments on a need basis. Section 1206, subchapter 10, Title 42, U.S.C.A., provides for the purpose of said subchapter the term "aid to the blind" means payments to or medical care to blind individuals who are needy. Said section reads:

"For the purposes of this subchapter, the term 'aid to the blind' means money payments to, or medical care in behalf of or any type of remedial care recognized under State law

Mr. Proctor N. Carter

in behalf of, blind individuals who are needy, but does not include any such payments to or care in behalf of any individual who is an inmate of a public institution (except as a patient in a medical institution) or any individual (a) who is a patient in an institution for tuberculosis or mental diseases, or (b) who has been diagnosed as having tuberculosis or psychosis and is a patient in a medical institution as a result thereof."

So, any applicant not being in need is entitled to no Federal participation under House Bill No. 98, supra, however, said applicant may apply under House Bill No. 97, supra, which provides for a blind pension of \$50.00 monthly. In either case an applicant qualifying under either proposed bill shall be entitled to \$50.00 per month. If he can qualify under House Bill No. 98, he is entitled to \$50.00, and if he cannot qualify thereunder, he may apply under the provisions of House Bill No. 97, which also grants him a flat \$50.00 a month pension.

In view of the foregoing, our answer to your first question is in the negative.

Likewise our answer to your second inquiry is in the negative for the reason that the Federal-State program for aid to the blind is that provided for by proposed House Bill No. 98 and Sections 1201-1206, inclusive, subchapter X, Title 42, as amended U.S.C.A. That aid received as old age assistance and total disability is not aid under the Federal-State program for aid to the blind as provided in Line 17, Section 209.040 of proposed House Bill No. 97.

The same is true of your third inquiry. The law is clear as to what any applicant is entitled to receive under House Bill No. 97, supra, provided he can qualify for a pension under that act. As previously stated, it provides that he shall be entitled to receive a pension of \$50.00. This is mandatory and the administrative agency, the Division of Welfare, cannot require said applicant to take something else in lieu of the \$50.00, provided for under House Bill No. 97, if he meets the qualifications thereunder.

Mr. Proctor N. Carter


CONCLUSION

It is, therefore, the opinion of this department that in answer to your first question, the administrative agency, the Division of Welfare, is not authorized under proposed House Bill No. 97 or House Bill No. 98 to pay a grant of less than \$50.00 per month to any person qualifying under either program. Second, that any individual receiving old age assistance or permanent and total disability aid in the amount of less than \$50.00 shall not be considered as receiving aid under a Federal-State program for aid to the blind as set forth in Line 17, Section 209.040 of proposed House Bill No. 97. Third, that a blind person eligible and receiving benefits under the provisions of proposed House Bill No. 97 cannot be compelled to accept some other type of aid in lieu of his pension other than aid to the blind as provided under the provisions of proposed House Bill No. 98, should he qualify thereunder.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

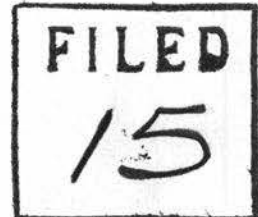
ARR:VLM

BLIND PENSIONS: Amount of payment under House Bill No. 97 and House Bill No. 98, passed by the 66th General Assembly.

August 9, 1951

8-17-51

Mr. Proctor N. Carter, Director
Division of Welfare
Department of Public Health & Welfare
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads:

"House Bills 97 and 98, enacted by the 66th General Assembly, will become effective on October 9, 1951. Both of these bills increase payments to blind persons from \$40.00 a month to \$50.00 a month. House Bill 97 contains amendments to the present blind pension law, and House Bill 98 provides for aid to the blind. Assuming that a state plan will be approved by the Federal authorities by October 9 and that we can make the necessary transfers of persons from the blind pension rolls to the aid to the blind rolls, I desire to make blind pension payments and aid to the blind payments for October and succeeding months on a current basis; that is to say, payments would be made within the month for that particular month.

"Blind pension payments in the past have been made in arrears; that is, a person whose name appeared on the rolls did not receive his check for a month's pension until the following month, when he was paid by check for the previous month's accrued pension. The payment of blind pensions in arrears or 'last accrued' was required by Section 9457, R.S. Mo. 1939, prior to the amendment of this section in 1949, Laws of Missouri, 1949, page 522, and what is now Section 209.090, R.S. Mo. 1949.

"To blind pension recipients who are duly enrolled on the blind pension rolls on

Mr. Proctor N. Carter, Director

October 9, 1951, and to persons determined to be eligible to receive aid to the blind, who have been transferred from the blind pension rolls, I propose to issue a \$40.00 check in the month of October for the month of September and to issue a second check in the month of October on the basis of \$40.00 a month for the first eight days in October and on the basis of \$50.00 per month for the balance of the month.

"I would appreciate receiving an opinion from you as to the legality of the proposed plan of payment as outlined above."

Under the present blind pension act, Chapter 209, RSMo 1949, payment of blind pensions is made in arrears--that is, one on the blind pension roll during the month of January is paid for January in the month of February. Under the present blind pension law, one qualified and on the roll is entitled to receive \$40.00 per month (see Section 209.040, RSMo 1949). Under House Bill No. 97, passed by the 66th General Assembly, which amends the present blind pension law, and House Bill No. 98, also passed by that body, which provides aid to the blind, the monthly benefit is increased to \$50.00. However, neither of these bills become effective until October 9, 1951. For this reason, you inquire as to how much and when to pay recipients of blind pensions and aid to the blind in this state for the month of September and October, 1951, the month immediately prior to and the month when the two bills become effective.

Certainly payments under the two new bills, namely House Bill No. 97 and House Bill No. 98, supra, cannot be made until such bills finally become effective. Retrospective payments cannot be made thereunder as there is nothing in the two bills to indicate that the legislative intent was to allow benefits thereunder for the full month of October. Furthermore, Section 13 of Article I of the Constitution of Missouri, 1945, is a prohibition against ex post facto laws or laws operating retrospectively. Said amendment reads:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

Mr. Proctor N. Carter, Director

In *Lucas v. Murphy*, 156 S.W. (2d) 686, 348 Mo. 1078, the court held that statutes must be held to operate retrospectively only unless the intent is clearly expressed that they shall act retrospectively or a language of the statute admits no other construction. See also *United States v. United Shoe Machinery Co.*, 264 F. 138, affirmed 42 S. Ct. 363, 258 U.S. 451.


In view of this, it seems the only law in full force and effect relative to the payment of blind pensions until October 9, 1951, when House Bill No. 97 and House Bill No. 98, supra, become effective, is the present blind pension act which authorizes payments in an amount of \$40.00 monthly to those who are qualified thereunder and on the blind pension roll. In view of this, the only logical and reasonable conclusion is that those persons qualified under the present blind pension act and on the blind pension roll shall be issued a check for benefits in the amount of \$40.00 for the month of September and be paid a check for benefits for the first eight days of October at the rate of \$40.00 per month, and then said recipient shall be entitled to a benefit payment from October 9 to the balance of that month based on \$50.00 monthly under whichever bill he qualifies, either House Bill No. 97 or House Bill No. 98, supra. While this may be a little inconvenient in the administration of the law, it appears to be the only equitable solution. We cannot by the greatest stretch of imagination see why this manner of payment should cause the Federal Social Security Board to refuse to participate in payments under these programs.

CONCLUSION

Therefore, it is the opinion of this department that any person now on the blind pension roll shall be entitled to receive a \$40.00 payment for September under the present law and then another payment for only the first eight days of October, 1951, prorated on a monthly benefit of \$40.00, and for the balance of October, be entitled to a payment prorated on a monthly benefit of \$50.00. This is the same whether he qualifies under the present blind pension law and amendment thereto, namely House Bill No. 97, or qualifies under House Bill No. 98, supra, for aid to the blind.

Respectfully submitted,

APPROVED:



J. E. TAYLOR
Attorney General

AUBREY R. HAMMETT, JR.
Assistant Attorney General

ARR:VLM

PURCHASING AGENT: PURCHASE OF
PUBLIC PRINTING AND OTHER SUPPLIES:



April 10, 1951

State Purchasing Agent must follow procedure set out in Sections 34.170; 34.200; 34.210; 34.230, RSMo 1949, in purchasing all state printing. "Notice of Change of Purchase Order" not authorized therein cannot be used by him to effect increase or decrease of amount bid for printing or other supplies subsequently to execution of contract by successful bidder and Purchasing Agent. Upon successful completion, delivery and approval of printing or other supplies, bidder entitled to receive only amount of bid, and state not liable for any other sums.

4-16-51

Honorable Leo J. Clavin
State Purchasing Agent
Division of Procurement
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads as follows:

"Certain questions have arisen concerning purchase of various items. Stating a hypothetical case as follows:

"The Office of the State Purchasing Agent advertises for bids on certain commodities or services as required by the statutes. The case cited has to do with printing and the figures which will be given are approximate. A bid is received in the amount of \$16000.00 on a certain printing job, the bidder to furnish all necessary papers and binding materials. This bidder did not insert in his bid an escalator clause, but the bid was considerable lower than all others submitted, and was based on the cost of papers and binding materials at the time his bid was submitted. A period of approximately sixty days elapsed between the time contract was awarded and the time paper was shipped from the mills to the bidder. During this period the mills increased the paper cost in the amount of seven per cent of the total bid or approximately \$1100.00. The successful bidder put this job

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in completion in his plant, advising us of the increase cost of papers to him. Upon receipt of this information from the bidder we issued a Change of Purchase Order authorizing this bidder to increase his cost approximately \$1100.00. A copy of this Change of Purchase Order was furnished the department for whom the work was being done, a copy was sent to the bidder, the Comptroller's was furnished with a copy for the purpose of increasing the encumbrance and a copy was retained in this office. It has been a trade practice in the printing industry for a number of years that an overrun or an underrun not in excess of ten percent or less than ten per cent of the original quantity is acceptable by all puyers of printing.

"The question is, 'Are we authorized to issue a Change of Purchase Order instructing to either increase or decrease the amount of his original bid, which ever the case may be and when a Change of Purchase Order is issued and everyone concerned furnished with a copy of the Change of Purchase Order, is the Department for whom the merchandise or services being purchased, authorized to acknowledge and accept this increase, when invoice is rendered to them by the bidder, or can they disregard such Change of Purchase Order and pay only the amount of the original bid?'

"We thank you for your consideration of this question and would appreciate your opinion for our future guidance, at your convenience."

We are also in receipt of your later letter in reply to our inquiry of the meaning of the term "Change of Purchase Order" referred to in the opinion request. This letter gives no definition as was hoped, but gives an example in which it was believed the use of the "Change of Purchase Order" was properly made. A copy of "Change of Purchase Order" or "Notice of Change of Purchase Order," together with a copy of "Short Form Contract (Supplies)" were enclosed, and it is noted that these forms have been in use by your department for years.

The sections of the 1949 statutes to which we refer, are as follows:

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Section 34.170, provides:

"The state purchasing agent shall purchase all public printing and binding of the state, including that of all executive and administrative departments, bureaus, commissions, institutions and agencies, the general assembly and the supreme court. In such capacity the state purchasing agent is hereby empowered and authorized to take over as a part of the records of his office, all books, documents and records which are now in the hands of the commissioners of public printing and the secretary of state relative to public printing. It shall be the duty of all state officers to order all of their printing and binding through the state purchasing agent. The purchasing agent may authorize any state penal, eleemosynary or educational institution to procure all or any part of its own printing and binding."

Section 34.200, provides:

"The state purchasing agent shall prepare specifications for all printing to be contracted for and shall invite all bids and let all contracts upon such specifications which shall be a part of each contract and shall not be changed or modified after the contract is awarded. Such specifications prepared by the purchasing agent shall state clearly and distinctly the kind and character of the work to be done, the quality of paper desired, the number of copies to be furnished, and wherever possible shall have attached a sample of previous issues of the publication or form. Copies of such specifications shall be made available to all bona fide applicants therefor."

Section 34.210, provides:

"The state purchasing agent shall have the public printing of the state executed upon competitive bids, and shall award the contract to the lowest responsible bidder and shall in all instances reserve the right to reject any and all bids; provided, that printing jobs of less value than fifty dollars may be purchased on the open market if approved by the comptroller. The purchasing agent may combine orders or subdivide individual jobs

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for the purpose of advertising and contracting as shall be to the best interests of the state. The purchasing agent shall exercise diligence in soliciting bids from all printing firms in the state that might reasonably be expected to be interested in bidding on any particular item and shall at all times endeavor to maximize competition among potential bidders. Bonds satisfactory to the purchasing agent shall be given by the parties to whom contracts are awarded, to secure the faithful performance of such contracts."

Section 34.230, provides:

"All accounts accruing under this law shall be submitted by the vendor to the purchasing agent who shall examine such accounts to ascertain if the printing delivered by the contractor complies in all ways with the specifications and the contract governing the same, after which said accounts shall be presented to the officer for whose department the work was done who shall likewise examine the account before submitting it to the comptroller for payment. The purchasing agent shall keep a record of the cost of printing and binding and a copy of each document shall be duly filed and preserved by him, with the number of copies ordered and delivered and the cost endorsed thereon. The cost of all printing and binding, including annual reports, shall be charged to the appropriation of each agency ordering the same."

Section 34.210, supra, authorizes the purchasing agent to offer each job of public printing for competitive bids, with the right to reject any and all bids left to his discretion, and to award the contract to the lowest responsible bidder. In order to assure the faithful performance of the contract, he is authorized to require a bond from such bidder, which shall be acceptable to the purchasing agent. It is noted that the provisions of this section are applicable to all state printing jobs, except those where the value of same is fifty dollars or less, in which latter instance the purchasing agent is not required to receive bids, and let the contract to the lowest responsible bidder, but may purchase the printing on the open market.

We believe the sections of the statutes quoted above provide every step of the procedure by which the purchasing agent is to

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purchase all public printing for the state, and that said statutes appear to be complete in every detail, and leave nothing to conjecture, and that if they are carefully followed, the purchasing agent may rest assured that he will have done his duty in his effort to secure the state printing and that contracts relating to same will be legal insofar as such statutes are concerned. We also add that in view of the fact that the procedure set forth in these statutes is the only one by which the state may obtain printing, that in the absence of express provisions therein, the purchasing agent has no right or legal authority to change the procedure in any manner, or to substitute customs or practices of his own in purchasing such printing. However, he may legally adopt those reasonable rules or regulations found to be useful or necessary to facilitate the efficient handling of all work of his department, so long as they do not conflict with any provisions of the statutes. It seems that he has been given some discretion in the operation of his department, and in the purchasing of supplies for the various state departments generally, under the provisions of Chapter 34, RSMo 1949. The example given in such letter (and we take it that this example has frequently been followed) illustrates a practice often followed by the purchasing agent in purchasing supplies for various departments, boards or bureaus of the state government. While it appears that your inquiry pertains to the legality of the practice described by you as applied to the purchase of any kind of supplies needed by the state, you have, nevertheless, illustrated the practice in question by particular reference to the purchase of printing. We shall therefore endeavor to answer your inquiry by considering the illustration presented by you and we therefore find it appropriate to cite and quote certain statutes pertaining to the purchase of state printing.

It is our thought that by issuing the alleged "Change of Purchase Order," or that by the use of any other method the purchasing agent could not allow a successful bidder of certain state printing to increase the amount of his bid after the contract had been awarded, and the execution of same was had and that such procedure is not a reasonable rule or regulation that might be adopted by the purchasing agent for the efficient operation of his department; and that such procedure is, not only not authorized by any Missouri statutes, but is directly in conflict with those quoted above providing the exclusive method of purchasing public printing, particularly Section 34.210.

Under these sections, the contract is awarded to the lowest responsible bidder, and upon satisfactory completion and delivery

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of the work, such bidder is to receive no more or no less than the amount of his bid, and only for this amount is the state obligated to pay him under the contract. It is obvious that the intention of the legislature in the enactment of these statutes was that the state would be assured of receiving all necessary and adequate printing at the lowest possible cost to the state, and that no one was to have the right at any time to increase or decrease the amount of any bid on any job of printing contracted for by the purchasing agent.

While it is unfortunate that the contractor in the instant case finds himself in a difficult situation and may suffer financial loss if required to furnish the printing at the contract price, yet it does not appear that the legislature intended that one in such a position should be released from his contractual obligations for such reasons, and that the greater interests of the state should be allowed to suffer because of the financial loss sustained by the contractor by reason of his inability to perform his part of the contract without such loss. It seems the requirement that the purchasing agent must secure a sufficient bond from the successful bidder, was meant to cover such unfortunate occurrences as that related in your letter, and assure the delivery of the printing ordered regardless of the financial loss or other inability of the contractor to fulfill his obligation.

Therefore, in answer to your inquiry, for the reasons given above, the "Change of Purchase Order," or the "Notice of Change of Purchase Order" not having any legal existence, the purchasing agent lacks the power and may not resort to the use of the alleged instrument as a method by which the price of printing may be increased or decreased and thereby change from the amount of the bid of the successful bidder inserted in the contract awarded to such bidder by the purchasing agent, subsequent to the execution of the contract. We are of the opinion that if the procedure for purchasing printing as set out in the above statutes is followed, the contract referred to in the hypothetical statement of facts is binding, and upon completion, delivery, and approval of the printing by the head of the department for which the printing was ordered, and the approval of the purchasing agent, the successful bidder will be entitled to receive only the amount of his bid expressed in the contract, as compensation for his work, and the state shall not be obligated to pay him any other sum of money for such printing.

CONCLUSION

In view of the foregoing, it is the opinion of this department that in purchasing all supplies for the State of Missouri, as required

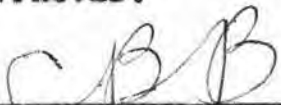
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of him by law, it shall be the duty of the state purchasing agent to follow that procedure authorized by the provisions of the particular statutes applying to the purchase involved; and that in the absence of a specific grant therein contained, the purchasing agent has no power to promulgate rules or regulations different from the provisions of said statutes, or to follow any other procedure in purchasing for the State of Missouri than that contained in said statutes. Since the law does not define or provide for the issuing of a "Notice of Change of Purchase Order," referred to in the opinion request, the purchasing agent lacks the power and may not adopt same as a method by which to allow a successful bidder, to whom a contract to furnish certain services or supplies has been let, to increase or decrease the amount of his bid subsequently to the execution of the contract and we are of the opinion that in such instance where it appears that the amount of such bid has been written into the contract; upon completion and delivery of the services or supplies of the department for which it was ordered, and upon the approval of same by the head of that department, as well as that of the purchasing agent, the successful bidder is entitled to receive as compensation for his services the amount of his bid, and the State of Missouri shall not be obligated to pay any other or different amount to him for said services.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

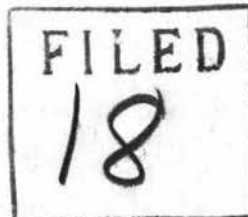
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NEPOTISM: Circuit clerk may appoint as his deputy the first cousin of his father-in-law without
CIRCUIT CLERK: violating the nepotism law in this state.

January 8, 1951

1-9-51

Honorable Joe W. Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri



Dear Sir:

This will acknowledge receipt of your request for an official opinion, which reads:

"Would you please give me an opinion on whether or not a circuit clerk can appoint as his deputy a person who is a first cousin to the father of the circuit clerk's wife, without violating Art. 14, Sec. 13 of our Missouri Constitution.

"Also how are the degrees of consanguinity and affinity counted under said article and section."

Section 6, Article VII of the Constitution of Missouri, 1945, is a constitutional amendment that is generally referred to as a nepotism law in this state and reads:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

Under the foregoing provision, your circuit clerk would forfeit his office if the first cousin to his father-in-law comes within the fourth degree by consanguinity or affinity.

The definition of "consanguinity" is found in Volume 12, Corpus Juris, page 510, and is as follows:

"Consanguinity or kindred is the connection or relation of persons descended from the

Honorable Joe W. Collins

same stock or common ancestor, vinculum personarum ab eodem stipite descendentem, as distinguished from affinity, or relationship by marriage; the being of the same family and stock; the having the blood of some common ancestor; blood relationship; relationship by blood; the actual relationship of blood. * * * "

and in Volume 2, Corpus Juris, page 378, is the following definition of "affinity":

" * * * The term has been variously defined as the connection existing in consequence of marriage between each of the married persons and the kindred of the other; the connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relations of the wife as that in which she herself stands toward them, and gives to the wife the same reciprocal connection with the relations of the husband. * * * "

In Encyclopedia Britannica, 11th Edition, Volume I, page 301, the author has the following to say about "affinity":

"The marriage having made them one person, the blood relations of each are held as related by affinity in the same degree to the one spouse as by consanguinity to the other. But the relation is only with the married parties themselves and does not bring those in affinity with them in affinity with each other: so a wife's sister has no affinity to her husband's brother."

Applying the foregoing definitions of affinity in this instance, it will be seen that the circuit clerk is related to his wife's blood relatives by affinity.

There are two well established methods of determining relationship, namely, the canon law and the civil law. These rules are clearly set out in Volume 12, Corpus Juris, page 511, and read:

Honorable Joe W. Collins

"There are two methods of computing the degrees of consanguinity: One by the canon law, which has been adopted into the common law of descents in England and the other by the civil law which is followed both there and here in determining who is entitled as next of kin to administer personalty of a decedent. The computation by the canon law . . . is as follows: "We begin at the common ancestor, and reckon downwards; and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related. By the civil law, the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person, reckoning a degree for each person, both ascending and descending. By this mode the intestate is taken as the terminus a quo, and the propinquity to him of any collateral relative is determined by the sum of the degrees in both lines to the common ancestor." The clearest and most comprehensive exposition of the subject . . . is in 2 Coke Lit *p. 158 (Thomas Ed., p. 129), as follows: "It is to be noted that in every line the person must be reckoned from whom the computation is made. And there is no difference between the canon and civil law in the ascending and descending line, but in the collateral line there is. Therefore, if we will know in what degree two of kindred do stand according to the civil law, we must begin our reckoning from one by ascending to the person from whom both are branched, and then by descending to the other to whom we do count, and it will appear in what degree they are. For example, in brothers' and sisters' sons, take one of them and ascend to his father, there is one degree; from the father to the grandfather, that is the second degree: then descend from the grandfather to his son, that is the third degree; then from his son to his son, that is the fourth. But the canonists do ever begin from the stock, namely, from the person from whom they do descend, of whose distance the question is. For example, if the question be, in

Honorable Joe W. Collins

what degree the sons of two brothers stand by the canon law, we must begin from the grandfather and descend to one son, that is one degree; then descend to his son, that is another degree: then descend from the grandfather to his other son, that is one degree; then descend to his son, that is a second degree: so in what degree either of them are distinct from the common stock, in the same degree they are distant between themselves; and if they be not equally distant, then we must observe another rule. In what degree the most remote is distant from the common stock, in the same degree they are distant between themselves: and so the most remote maketh the degree."

McDowell v. Addams, 45 Pa. 430, 432. (2)

"In determining the degrees of relationship by consanguinity or affinity, like in determining the descent of property, we must proceed from a single, definite propositus. In the descent of property the propositus is the ancestor or person from whom the descent is reckoned. In consanguinity it is a single, definite person; and in affinity it is a single, definite marriage." * * *

This office has on several occasions ruled that the civil law methods should be used in determining relationship for the purpose of enforcing the nepotism law in this state. Applying the civil law rule in determining the relationship between the circuit clerk and the first cousin of his father-in-law, the first degree of relationship would be to ascend to the father of the clerk's wife, the second degree to the grandfather of the clerk's wife, the third degree to the great-grandfather of the clerk's wife, the fourth degree descend to the great uncle and the fifth degree descend to the great uncle's son or first cousin of the father of the circuit clerk's wife, who is also the second cousin of the circuit clerk's wife, which places the first cousin of the father of the circuit clerk's wife within the fifth degree by affinity to the circuit clerk.

CONCLUSION

Therefore, it is the opinion of this department that under the civil law rule for determining relationship for the purpose


Honorable Joe W. Collins

of enforcing the nepotism law in this state, the first cousin of the father of the circuit clerk's wife comes within the fifth degree relationship by affinity and the circuit clerk may appoint said first cousin of his father-in-law as his deputy without violating the nepotism law in this state.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

ARH:VLM

BONDS:
COUNTIES:
COUNTY TREASURERS:

County Court of Cedar County required to pay premium on surety bonds executed by the county treasurer and may not cancel said bonds unless the bonds contain a cancellation clause or for cause.

February 26, 1951

Honorable Joe Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri



Dear Sir:

On February 5, 1951, this department rendered an official opinion to you on several questions relating to the validity and payment of premiums on the surety bond for your newly elected county treasurer. This is to inform you that since rendering that opinion and upon reviewing same, we consider it necessary to amend our former opinion. So, will you kindly consider this the official opinion to your request since we have withdrawn our opinion dated February 5, 1951. Your request reads as follows:

"A new County Court was elected in Cedar County, which is a County of the 4th class, at the last November election. The Treasurer who was also elected gave a surety bond under Section 10400 of Laws of 1945 page 1708 Section 1 and a bond under Section 13,795 Laws of 1937 page 424 and Laws of 1945 page 1968 Section 1. These bonds were approved by the old county court before January 1, 1951. The new County Court want to know if they have a right to consider the bonds and approve or disapprove them and they wish to know whether or not the approval of the bonds by the old County Court is valid.

"They also want to know if the County is obligated to pay the premium on these bonds for the 4 year term of office of the Treasurer, if they as a new court disapprove the Surety bonds which were approved by the old court."

A county treasurer and a new county court were elected in Cedar County in November, 1950. Said county does not have township organization.

Honorable Joe Collins

Apparently the newly elected county treasurer secured surety bonds as required under Sections 54.160 and 54.070, RSMo 1949, and submitted said bonds to the old county court holding office in 1950 for its approval. This all transpired prior to the newly elected county court's induction into office.

Under Section 54.070, the county treasurer is required to enter into a surety bond 10 days after his election, and reads:

"The person elected or appointed county treasurer under the provisions of this chapter, shall, within ten days after his election or appointment as such, enter into a surety bond or bonds with a surety company or surety companies, authorized to do business in Missouri, to the county in a sum not less than twenty thousand dollars nor more than the highest amount of money held by the treasurer at any one time during the year prior to his election or appointment, to be fixed and approved by the county court, conditioned for the faithful performance of the duties of his office, and the cost of said bond shall be paid out of the general revenue fund of the county; provided, that the county treasurer in any county of the third class or fourth class may furnish either a personal bond or a surety bond and in case a surety bond is required by the county court in said county, said surety bond shall be paid for by said county."

Section 54.160, supra, does not require said elected county treasurer to enter into a surety bond within 10 days after elected, but before entering upon the duties of his office, and reads:

"The county treasurer in each county shall be the custodian of all moneys for school purposes, belonging to the different districts, until paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district, as authorized by law, except in counties having adopted the township organization law, in which counties the township trustee shall be the custodian of all school moneys belonging to the township, and

Honorable Joe Collins

be subject to corresponding duties as the county treasurer; and said treasurer shall pay all orders heretofore legally drawn on township clerks, and not paid by such township clerks, out of the proper funds belonging to the various districts; and on his election, before entering upon the duties of his office, he shall give a surety company bond, with sufficient security, in the probable amount of school moneys that shall come into his hands, payable to the state of Missouri, to be approved by the county court, and paid for by the county court out of the county common school funds, conditioned for the faithful disbursement, according to law, of all such moneys as shall from time to time come into his hands; and on the forfeiture of such bond it shall be the duty of the county clerk to collect the same for the use of the schools in the various districts. If such county clerk shall neglect or refuse to prosecute, then any freeholder may cause prosecution to be instituted. It shall be the duty of the county court in no case to permit the county treasurer to have in his possession, at any one time, an amount of school moneys over the amount of the security available in the bond; provided that the county treasurer in any county of the third class or fourth class may furnish either a personal or surety bond and in case a surety bond is required by the county court in said county, said surety bond shall be paid for by said county."

In either case, before said county treasurer assumes the duties of his office, he must either execute surety bonds as provided hereinabove or in counties of the third and fourth class, the county treasurer may execute personal bonds unless the county court requests the treasurer to furnish surety bonds. Cedar County being a county of the fourth class, in this instance the county treasurer could have executed personal bonds in the absence of such a request of the county court to furnish surety bonds.

One of the primary rules of construction of statutes is to ascertain the lawmakers' intent from words used, if possible, and to put upon the language of the Legislature honestly and faithfully its plain and rational meaning and to promote its object. Union Electric Co. v. Morris, 222 S.W. (2d) 767, 359

Honorable Joe Collins

Mo. 564. In State ex rel. Jefferson Co. v. Sheible, 163 S.W. (2d) 559, the court held that generally a bond should be construed to carry into operation the reasonable intention of the parties.

This department has heretofore ruled that the only way for a county court to pay the premium on surety bonds required of a county treasurer is for the county court to first order him to secure said surety bonds in lieu of personal bonds, and if the county treasurer furnishes surety bonds without the county court requiring them, said county treasurer will be required to pay the premiums thereon. (See copies of opinions rendered by this department on March 8, 1947, and March 27, 1947, to Honorable William E. Shirley and Honorable W. C. Frank, Prosecuting Attorneys of Adair County, respectively, previously attached for your perusal.) So, for the purpose of this opinion, we are assuming the county court did request said county treasurer to furnish surety bonds.

In view of the fact the county treasurer must secure surety bonds under one statute 10 days after his election in November, and under the other statute he is required to do so before he enters upon the duties of his office, he would necessarily have to do this prior to the newly elected county court's assuming office. So, this would require approval of the then county court and not the newly elected one.

Ordinarily surety bonds for the faithful performance of duty, etc., cover the term of office of the appointed or elected official. However, the bond by its very terms may specify a different period, and if this be the case, then whatever time is specified in said bond as to its duration is controlling. (See 11 C.J.S., Section 55d, pages 431, 432.) However, this no longer applies to county officers for the reason that Section 26(a), Article VI of the Constitution of Missouri, 1945, prohibits a county from becoming indebted in an amount exceeding in any year the income and revenue provided for such year. We are enclosing a copy of an opinion rendered by this department under date of January 12, 1948, to Honorable Ralph Baird, Prosecuting Attorney of Jasper County, Missouri, which holds that a county court is prohibited under Section 26(a), Article VI of the Constitution from becoming indebted in any year in an amount in excess of the income and revenue provided for such year and that a contract between the county and the surety company for payment over a four-year term of premiums on a county treasurer's bond does not bind the county for more than one year.

Honorable Joe Collins

Therefore, in view of the foregoing statutes and constitutional provision, the county court cannot enter into a contract with said surety company for a period to exceed one year; however, said court will be required to pay the premium on said bond for the first year, assuming that the old county court requested the newly elected county treasurer to furnish a surety bond.

CONCLUSION

It is the opinion of this department that the county court cannot pay the premium on said surety bonds executed by the county treasurer unless the then county court requested the newly elected county treasurer to furnish surety bonds in lieu of personal bonds. If such a request was made, then the county is liable for the premium on said bonds only for one year, notwithstanding the then Cedar County Court approved said bonds.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH:VLM

Enc.

SCHOOLS: School district may vote to annex to city district when city has extended limits, even
ELECTIONS: though district within period of two years had previously voted to annex to said city school district.

June 28, 1951

7-2-51

Honorable Joe Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department, which reads as follows:

"Upon Wednesday, May 9, 1951 a special election was held in Clintonville School District No. 9 to vote upon the proposition of annexing the district to the El Dorado Springs Consolidated School District No. 3, and the proposition carried.

"Previous to said election on April 25, 1950 an election was held in said district for the same purpose and resulted in a tie vote.

"Before the last election was held a portion of the territory of Clintonville School District No. 9 adjacent to El Dorado Springs, Missouri was incorporated in the El Dorado Springs, Consolidated School District No. 3.

"Section 10484, page 83, of the School Laws of Missouri 1947 contains a proviso that 'after the holding of any such special election, no other such special election shall be called within a period of 2 years thereafter.'

"Section 10486 provides for annexation to school districts when corporate limits are extended. Would you please let me know your

Honorable Joe Collins

opinion on whether or not the last election although held within a period of 2 years after the first election was legal and authorized under Sec. 10486 and under the law."

At our request for additional information you have further stated that after the first election held on April 25, 1950, which resulted in a tie vote, the city of El Dorado Springs, Missouri, by a vote of the people extended its territorial limits, resulting in a portion of the Clintonville School District being incorporated in the El Dorado Springs District. Thereafter, the election on May 9, 1951, to which you refer in your letter, was held. Your inquiry is directed at the legality of this last election which was held within a period of two years from the date of the first election of April 25, 1950.

Unless otherwise indicated, the section numbers of the Missouri Statutes referred to in this opinion will refer to the Revised Statutes of 1949.

From your letter it appears that the first election held on April 25, 1950, was held under the authority of Section 165.300, which, in part, reads:

"Whenever an entire school district, or a part of a district, whether in either case it be a common school district, or a city, town or consolidated school district, which adjoins any city, town, consolidated or village school district, including districts in cities of seventy-five thousand to five hundred thousand inhabitants, desires to be attached thereto for school purposes, upon the reception of a petition setting forth such fact and signed by ten qualified voters of such district, the board of directors thereof shall order a special meeting or special election for said purpose by giving notice as required by section 165.200; provided, however, that after the holding of any such special election, no other such special election shall be called within a period of two years thereafter."

Honorable Joe Collins

Inasmuch as this election resulted in a tie vote, the proposition for annexation did not carry and the annexation of the Clintonville School District to the El Dorado Springs District was not accomplished.

After this election no other special election could be held under the authority and provisions of the above statute within a period of two years either for the annexation of the whole district or for the release and annexation of only a part thereof. It was so held in the case of *State ex inf. Rice ex rel. Allman et al. v. Hawk*, 228 S.W. (2d) 785, where the Supreme Court of Missouri said, l.c. 787, 788, 789:

"Appellants assert that the special election of March 31, 1949, was valid because Sec. 10484, supra, authorizes more than one kind of an election; that is, either for the annexation of an entire school district to another school district or for the release and annexation of only a part of a school district. It is argued that the election of March 31, 1949, for the annexation of the entire district, involved a substantially different proposition than the one submitted at the prior election so that the second election was not affected by the proviso that 'no other such special election shall be called within a period of two years thereafter.' * * *

" * * * By its very terms, the statute recognizes only one purpose, which is to permit the annexation of territory of one school district to another, whether the proposal be to annex all or only a part of the school district.

"The language of the proviso is 'provided, however, that after the holding of any such special election, no other such special election shall be called within a period of two years thereafter.' It has been held that the word 'any', when used in such a context, is 'all-comprehensive and the equivalent of "every."' *State ex rel. Randolph County v. Walden*, 357 Mo. 167, 206 S.W. 2d 979, 983;

Honorable Joe Collins

Wormington v. City of Monett, 356 Mo. 875, 204 S.W. 2d 264. If we substitute synonyms for the words 'any' and 'such', the proviso would read: 'provided, however, that after the holding of every special election of the kind previously indicated, no other special election of the kind previously indicated shall be called within a period of two years thereafter.'

"We think it is clearly the intent of the statute that when a special election has been held under its provisions no other special election may be held thereunder within a period of two years thereafter. The language of the statute is clear and unambiguous, and we have no right to read into it an intent which is contrary to the legislative intent made evident by the phraseology employed. State ex rel. Jacobsmeyer v. Thatcher, 338 Mo. 622, 92 S.W. 2d 640; St. Louis Amusement Co. v. St. Louis County, 347 Mo. 456, 147 S.W. 2d 667. Accordingly, we hold that the special election held at the special meeting on March 31, 1949, was invalid and of no force and effect."

However, it appears from reading your letter that the last election of May 9, 1951, was purportedly conducted under the authority of Section 165.307, inasmuch as there was an intervening extension of the city limits of El Dorado Springs which resulted in a portion of the Clintonville School District being incorporated in the El Dorado Springs District. This latter section, in part, provides:

"Whenever, by reason of the limits of any city, town or village being extended, a portion of the territory of any school district adjacent thereto has been incorporated in the town or city school districts, the inhabitants of such remaining parts of districts shall have the right to be annexed to such town or city school district; provided, that when such part of a school district desires to be so annexed, an election shall be held at a special meeting, as provided in section 165.300, and should a majority of the

Honorable Joe Collins

votes cast favor annexation, the secretary shall certify the fact, with a copy of the record, to the board of said district and to the board of said town or city school district; whereupon the board of such town or city school district shall meet and confirm such annexation by a proper resolution of record; and provided, that when such part of a school district has no organization, any ten qualified voters may call a meeting of the district and proceed as provided in section 165.293; and the secretary of such meeting shall certify, if the majority vote for annexation, to the board of directors of the town or city school district, and the same action shall be taken as provided above."

It is our thought that the above-quoted statute confers upon the voters of a school district a new and separate right to conduct an annexation election where there has been an extension of the territorial limits of a city which has resulted in a portion of the district voting to annex being incorporated within the city school district whose limits have extended co-extensively with the limits of the city.

While the voters of a particular school district who have conducted an annexation election under the authority of Section 165.300, supra, would be precluded from conducting another such election under that statute within a period of two years, we do not believe that they would be precluded from conducting an annexation election under the separate and distinct authority and provisions of Section 165.307, supra, even though within a period of two years from the holding of an annexation election under authority of the other statute. In other words, Section 165.307 provides for holding an annexation election when a matter has arisen which has resulted in a change of circumstances, conditions and territorial boundaries of a particular school district, that is, the extension of the limits of a city which has resulted in the consuming of a portion of the school district.

Although your letter styles the El Dorado Springs District as the El Dorado Springs Consolidated School District No. 3, we believe that Section 165.307 would still be applicable inasmuch as Section 165.277 provides:

"The qualified voters of any community in Missouri may organize a consolidated school

Honorable Joe Collins

district for the purpose of maintaining both elementary schools and high school as hereafter provided. When such new district is formed it shall be known as 'Consolidated District No. _____ of _____ County,' and all the laws applicable to the organization and government of town and city school districts as provided in sections 165.263 to 165.373, shall be applicable to districts organized under the provisions of sections 165.277 to 165.290."

Consequently, it is our view of the matter that even though the election of May 9, 1951, was held within a two-year period of the election of April 25, 1950, it is not invalidated in view of the prohibition contained in Section 165.300 that "no other such special election shall be called within a period of two years thereafter."


CONCLUSION

In the premises, it is the opinion of this department that a portion of a school district remaining after a part of it has been incorporated within a school district located within a city or town which has extended its territorial limits may vote to become annexed to said school district within the city or town, even though such election is held within a period of two years after the entire district had voted to annex to the school district located within the city, the first annexation election being prior to the extension of the city limits.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

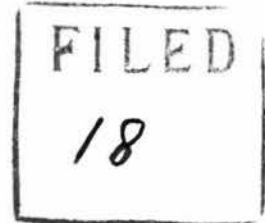
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SCHOOLS:

School buses upon which licenses have been issued free by the state cannot be leased by school district for purposes other than transportation of school children.

August 1, 1951

Honorable Joe Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department, which reads:

"May a school district which operates school buses by using free licenses issued by the state lease a school bus to Boy Scouts, Girl Scouts or Ball teams during the time that they are not in use for school purposes?"

Sections 301.010 through 301.440, RSMo 1949, provide for the registration and licensing of motor vehicles. Inasmuch as you state that the school district is operating the school buses in question and that the licenses for said buses are issued free by the State of Missouri, we assume that this is accomplished under the authority of Section 301.260, which, in part, reads:

" * * * Provided, further that when any motor vehicle is owned and operated exclusively by any school district and used solely for transportation of school children, the commissioner shall assign to each of such motor vehicles two plates bearing the words 'School Bus, State of Missouri, car no.', (with the number inserted thereon), which plates shall be displayed on such motor vehicles when they are being used on the highways. No officer, or employee of the municipality, county or subdivision, or any

other person shall operate such a motor vehicle unless the same is marked as herein provided, and no officer, employee or other person shall use such a motor vehicle for other than official purposes."

As we interpret the above statute, when licenses are issued for motor vehicles used solely for the transportation of school children, as provided therein, no person shall operate the motor vehicle in question for other than official purposes. In the case of school buses, it is our thought that the official purpose or use contemplated by the statute is solely that of transporting school children.

For the school district to permit its school buses to be used for the purpose of transporting Boy Scouts, Girl Scouts, or ball teams, would not be using them for an official purpose as contemplated by the statute.

It has also been held that a school district has only such powers as are conferred on it by statutes (Wright v. Board of Education, 246 S.W. 43, 295 Mo. 466), and we find no other statute which would permit a school district which is operating school buses with licenses issued free by the state to lease said buses for the purposes which you have stated in your letter.

CONCLUSION

It is therefore the opinion of this department that a school district operating school buses upon which licenses have been issued free by the state would not be authorized to lease said school buses to Boy Scouts, Girl Scouts, or ball teams, during the time that they are not being used for transportation of school children.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PURE SEED LAW

PERMIT TO SELL SEED

-) Commissioner of Agriculture has no authority
-) to promulgate regulation requiring seed law
-) violator to show cause why he should be issued
-) a seedsman's permit for the following year.

September 30, 1951

10/3/51

Mr. Loyd L. Combs
Assistant Director
Feed and Seed Divisions
Department of Agriculture
Jefferson City, Missouri



Dear Sir:

We have your recent request for an opinion of this department. Your letter is as follows:

"I would like a legal opinion on the following:

"Section 14267 of the Missouri Seed Law states in part: 'It shall be unlawful for any seedsman to sell, distribute, offer or expose for sale or distribution in this state, any agricultural seed or mixture thereof, or vegetable seed as defined in this law, without first securing a permit approved by the department of agriculture, which permit shall be issued annually by the department of agriculture upon the payment of an annual fee of one dollar. Such permit shall expire December 31st of each year.'

"Based upon the above section of the law, would the following regulation be valid?

"Any consistent violator of the Missouri Seed Law may be asked to show cause why he should be issued a seedsman's permit the following year.

Mr. Loyd L. Combs

"The main point in the above section of the Law upon which we base the regulation is the phrase 'without first securing a permit approved by the Department of Agriculture.'

"Since a seedman's permit is essentially a man's license to do business in the state in accordance with the provisions of the Missouri State Seed Law, it is hard to see why the Department of Agriculture should continue to approve the permit of a seedsman who puts forth little or no effort to abide by the Law and offer a good quality product to the farmer."

The statute, a construction of which is essential to the answer of your question, is set forth in your letter together with your proposed regulation. We are of the opinion that the statute does not confer upon you the power to promulgate the proposed regulation for the reason that there is no provision in the law authorizing the department of agriculture to refuse to issue a permit to a person who applies for it and offers the \$1.00 fee provided for and there is no provision authorizing the department to revoke a permit.

We call attention to the fact that a seedsman has not violated the above-quoted section until he has engaged in the seed-selling business without a permit. We are of the opinion that if and when he engages in such business without a permit he is immediately subject to the penalties prescribed in Section 266.130 RSMo 1949, which section is here quoted as follows:

"1. It shall be unlawful for any person, firm or corporation to sell, offer or expose for sale within this state any agricultural seeds or mixtures of agricultural seeds, or vegetable seeds, as defined in sections 266.010 to 266.140, for seeding purposes within this state without complying with the requirements of said sections or to falsely mark or label any agricultural or vegetable seeds, or to interfere in any way with the said department or its agents in the discharge of the duties named in said sections,

Mr. Loyd L. Combs

"2. In addition to the penalties imposed in sections 266.010 to 266.140, any lot of seed as prohibited in this section may be ordered temporarily withdrawn from sale by the department, pending either the informal adjustment according to law between the authorized representative of the department and the seed dealer or person in charge of the seed in question, or the filing of a formal complaint, without undue delay, with the attorney general or prosecuting attorney."


The procedure for the assessment of these penalties is set forth in Section 266.140, RSMo 1949. It is therefore apparent that the provision for the issuance of a seedsman's permit is strictly a revenue measure rather than a regulatory measure.

CONCLUSION

We are accordingly of the opinion that the proposed regulation is not authorized by law.

Respectfully submitted,

APPROVED:


J. E. TAYLOR
Attorney General

SAMUEL M. WATSON
Assistant Attorney General

SMW:mw

ROADS AND BRIDGES,) The county court may exercise discretion when
MAINTENANCE:) authorized to maintain a county bridge.

October 22, 1951

10/22/51

Mr. Joe Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri



Dear Mr. Collins:

We have given careful consideration to your recent request for an opinion, which request is as follows:

"I am writing you concerning Road District No. 5 of Cedar County, Mo., which road district is not a special road district. The assessed valuation of this road district is \$53,270. There is a bridge in this district which crosses Cedar Creek which is a sizeable stream. Reputable people living in this road district have asked the County Court to maintain this bridge as they say their district is not able to obtain it.

"The money anticipated by the County Budget in the road and bridge fund for this year has already been expended and the county court has refused to repair the bridge.

"Is it the duty of the County Court under Sections 8534 and 8552 Laws of Missouri relating to roads, highways and bridges 1949 and 50 Revision issued by Walter H. Toberman, Secretary of State, and under the law to maintain the bridge or is it within their discretion? If it is not the duty of the County Court to maintain the bridge

Mr. Joe Collins

and the district does not have enough assessed valuation to maintain it, then the bridge when it becomes dangerous for travel would have to be abandoned. Two mail routes and three milk routes travel over this bridge daily. The road running across the bridge is the main artery between Highway 54 and 64 east and west in Cedar County, Missouri."

The two sections referred to in your letter are incorporated as Sections 234.010 and 234.030, RSMo 1949.

Section 234.010 is as follows:

"Each county court shall determine what bridges shall be built and maintained at the expense of the county and what by the road districts; provided, that no road district shall be compelled to build a bridge which costs fifty dollars or more."

Section 234.030 is as follows:

"Whenever the highway engineer of any county is notified by any road overseer, or other reputable person, that any county bridge has been badly damaged by recent floods, or is otherwise in imminent danger of falling in, or is dangerous in any manner to public travel, said highway engineer, with the consent of one or more of the county judges, may contract with some bridge contractor, or other competent person, and have said bridge repaired forthwith, and the county court, at the next term thereof, shall allow a reasonable compensation for such repair, not to exceed the reasonable cost thereof, plus ten per cent."

There seems to be nothing in these statutes or any other laws of Missouri to make it mandatory on the county

Mr. Joe Collins

court to maintain the public bridges of the county. The Supreme Court of the state has consistently held that the county court has wide discretion in all such matters.

In the case of State ex rel. v. Thomas, 183 Mo. 220, 1.c. 229, the court said:

"* * * The provisions of the statute, following down to and including sections 5193 and 5194, prescribe in detail the manner in which the power and discretion thus vested in the county court shall be exercised under different and variant circumstances, and among these under the circumstances set out in those two sections. But the law nowhere contemplates that any bridge shall be built at the expense of the county, in whole or in part, except such a bridge as the county court shall have determined to be necessary, in view of its locality, utility, cost, and the condition of the public fund that may be used for that purpose, considered in connection with other like claims upon such funds for like purposes. The discretion thus vested in the county can not be wrested from it, or exercised by any other tribunal."

In the case of State ex rel. v. Everett, 245 Mo. 706, 1.c. 719, the court said:

"The discretion to expend the special road and bridge fund in the manner which will be most conducive to the general welfare of the inhabitants of the counties has been invested in county courts elected by the people; and it is a well-known rule of law that where judicial officers possess discretion as to how their duty shall be performed, their discretion will not be interfered with by the writ of mandamus. * * *"

Mr. Joe Collins

In the case of Drainage District v. Campbell, 196 S.W. 744, 1.c. 745, the court said:

"Several questions present themselves. Assuming mandamus will lie in such a case, can a drainage district, as such, maintain mandamus to compel county judges to repair bridges of any sort? Is the obligation to repair, under the facts pleaded, upon the county or the drainage district? Under our laws, can mandamus be employed to enforce the repair of bridges? In the view we take, the answer to the last question ends the case. If it be assumed the obligation is upon the county, yet this proceeding cannot be maintained. Bates county is under township organization, but the bridges are not such as come within the scope of the authority and duty of the township board. Sections 11773, 11774, R. S. 1909. Assuming the bridges are of a character to bring them within the scope of the county court's authority (and this is essential to appellant's case), that court's duty to repair is defined by section 10501, R. S. 1909, and under this section the county court has a discretion in the premises which cannot be controlled by mandamus. * * *"


CONCLUSION

It is the opinion of this office that the county court is not under duty to repair a county bridge but may exercise discretion in the premises where authorized by law to maintain such property.

Respectfully submitted,

APPROVED:

B. A. TAYLOR
Assistant Attorney General



J. E. TAYLOR
Attorney General

BAT/fh

ASSESSORS:
OFFICERS:
COUNTY COURT:
FEES AND SALARIES:

County assessor in third and fourth class county may appoint and fix compensation of clerical or stenographic assistants as may be necessary for the efficient performance of the duties of his office. Certification must be made to the county court by the county assessor before warrant could be drawn for payment of assistants. Assessor appointing wife as assistant would forfeit office.

December 31, 1951



1-8-52

Honorable Joe Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department which reads as follows:

"I understand that your department has rendered an opinion that House Bill No. 70 of the 66th General Assembly of Missouri will take effect and be in force on and after the 9th day of October, 1951.

"I would like to have your opinion on whether or not the County Assessor in 4th class counties may appoint and affix the compensation of clerical or stenographic assistant under said House Bill without approval of the County Court. And when the clerical or stenographic assistant is appointed and his compensation fixed by the County Assessor is it then the duty of the County Court to pay this compensation.

"I would also like to know if a county assessor may appoint his wife as a clerical or stenographic assistant without violating the nepotism laws."

House Bill No. 70, enacted by the 66th General Assembly, provides as follows:

"The county assessor in each county of classes three and four may appoint and fix the compensation of such clerical or

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stenographic assistants as may be necessary for the efficient performance of the duties of his office. The compensation of such clerical or stenographic assistants shall be paid from the county treasury and shall not exceed six hundred dollars per annum in counties of class three nor six hundred dollars per annum in counties of class four."

In your opinion request you have first asked whether or not the county assessor in a fourth class county may appoint and fix the compensation of clerical or stenographic assistants, provided for under the above Bill, without the approval of the county court.

You will note in reading the above quoted House Bill that no specific mention of the county court is contained therein, neither as to the matter of appointment of the clerical or stenographic assistants nor as to the fixing of their compensation.

In many statutes previously enacted by the Legislature providing for the appointment of assistants to certain officers there has been included a specific provision for the approval of said appointments.

For example, Section 13514, Revised Statutes of Missouri, 1939, provides for the appointment of assistants in the collector's office in certain class counties and specifically states such assistants shall be appointed "as the county court may deem necessary." The same statute also provides for stenographic assistants in the prosecuting attorney's office, and in so providing states that their appointment shall "be approved by the judge or judges of the circuit court of said county."

Similar provisions relative to the appointment and approval of stenographic assistants in the prosecuting attorney's office in certain class counties is contained in Section 13467, Revised Statutes of Missouri, 1939. There are other statutes which need not be cited that contain similar provisions relative to the appointment and approval of stenographic assistants.

We have cited these statutes to show that in many instances the Legislature has provided for the approval of stenographic or clerical assistants which are appointed. However, as previously noted, House Bill No. 70, supra, contains no specific provision for the approval of stenographic or clerical assistants appointed by the county assessor.

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We, therefore, conclude that the Legislature has given sole authority to the county assessor in third and fourth class counties to make the appointment of clerical or stenographic assistants, as provided in the aforementioned House Bill.

Regarding the matter of fixing the compensation of clerical or stenographic assistants appointed, the rule has been stated as follows in 43 Am. Jur., Sec. 345, p. 138:

"The power to fix the compensation of public officers is not inherently and exclusively legislative in character. Unless the Constitution expressly or impliedly prohibits the legislature from doing so, it may delegate the power to other governmental bodies or officers, as, for example, to the governor, to counties, to cities, to courts or judges, or to other officers or official boards."

With the enactment of House Bill No. 70 it appears that the Legislature has delegated to the county assessor in third and fourth class counties the power to fix the compensation of assistants which have been appointed within certain limitations, as said compensation shall not exceed Six Hundred Dollars a year.

In the case of *In Re McLure's Estate*, 220 Pac. 527, the Supreme Court of Montana, in construing the word "fix" contained in the statute providing for the probate court fixing the compensation of attorneys, said at l.c. 530:

"The word 'fix' means to decide definitely; to settle; to determine. Standard Dictionary; 2 Words and Phrases, Second Series, 575; Bouvier's Law Dictionary."

Again, in the case of *Kacsur v. Board of Trustees*, 109 Pac. 2d 731, the District Court of Appeals of California was construing a statute giving school boards the power to fix the compensation of teachers. In construing the law in question the court at l.c. 737 said:

"Section 5.731 of the School Code is as follows: 'Boards of school trustees, and city, and city and county boards of education shall have power and it shall be their duty to fix and order paid the compensation of

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persons in public school service requiring certification qualifications, employed by such boards, unless the same be otherwise prescribed by law.' We hold, upon the authority of Fidler v. Board of Trustees, 112 Cal. App. 296, 301, 296 P. 912, and cases therein cited, that the California School Code, which empowers school boards to fix the compensation of permanent teachers, confers upon such boards discretionary power to regulate such compensation and in the exercise of such power to decrease as well as increase such salaries; * * * "

In Baynes v. Bank of Caruthersville, 118 S.W.2d 1051, the Springfield Court of Appeals was construing a statute providing for the commissioner of finance to appoint expert assistants and counsel and fix their compensation subject to the approval of the circuit court. At l.c. 1052 the court said:

"Admittedly, under this statute, the Circuit Court does not have jurisdiction to fix the fees of a deputy or lawyer in the first instance but it is the duty of the Commissioner of Finance to act on such matters first, then the application or proposed payment must be submitted to the Circuit Court for its approval."

In view of the aforementioned authorities, we, therefore, conclude that the county assessor in third and fourth class counties, upon appointing clerical or stenographic assistants, has the exclusive authority to fix their compensation within the limitations provided by the statutes.

You have also asked if it is the duty of the county court to pay the compensation when clerical or stenographic assistants have been appointed and their compensation fixed by the county assessor.

Inasmuch as House Bill No. 70, supra, provides that the compensation of said assistants shall be paid from the county treasury, it would follow that this could only be done by warrants issued by the county court and drawn on the county treasury.

In this connection, Section 50.330, RSMo 1949, provides

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as follows:

"Any salary provided for a county officer, deputies and assistants, shall be paid in monthly installments on the first day of each month, by warrants drawn on the county treasury."

Inasmuch as the compensation or salaries of the assistants appointed by the county assessor must be paid by warrants issued by the county court, it would necessarily follow that before such warrants could be issued the county assessor would have to certify to the county court the names of the assistants appointed and the amount of salary or compensation they are entitled to receive, based upon the period of time for which services were rendered.

Since House Bill No. 70, supra, provides that such clerical or stenographic assistants may be appointed as may be necessary for the efficient performance of the duties of the county assessor's office, the question arises who should make the determination of necessity in the appointment of said assistants. In this connection, we again point out that the law in question makes no reference to the county court.

We have previously concluded that the sole power of appointment is vested in the county assessor and that there is no provision requiring the approval by the county court or any other body of any appointments made.

It would seem logical that the time for determining the necessity of having assistants in the county assessor's office would be when the appointments were made.

In the other statutes previously cited, wherein provision is made for approval of appointments, such provision was undoubtedly included for the purpose of having some official body other than the officer making the appointments determining the necessity of additional personnel.

Since the matter of approval is absent in the law we are considering, it is our thought that the county assessor who is vested with the sole power to make the appointment would also make the determination of necessity for other assistants. Consequently, we conclude that the county court would not be authorized to withhold the issuing of warrants for the payment of assistants on the ground that they were not necessary for

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the efficient performance of the duties in the county assessor's office.

We have previously stated that it would be necessary for the county assessor to certify to the county court the names of assistants appointed and the amount of salary or compensation to which they are entitled, based upon services rendered for a specific period. Therefore, we believe that the county court, before ordering the issuance of warrants for the payment of said assistants, would be authorized to ascertain whether or not the assistants were actually employed, whether or not services were actually rendered for the period of time certified, and whether or not the amount of the salary or compensation certified by the assessor for his assistants was within the statutory limit. Such would be for the purpose of determining whether or not a lawful indebtedness existed.

It is our thought that the county court could make the investigation as above outlined under the authority of Section 50.160, RSMo 1949, which provides as follows:

"The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts; to enforce the collection of money due the county; to order suit to be brought on bond of any delinquent, and require the prosecuting attorney for the county to commence and prosecute the same; to issue all necessary process to secure the attendance of any person, whether party or witness, whom they deem it necessary to examine in the investigation of any accounts; and in order to procure the exhibition or delivery to them of any accounts, books, documents or other papers, the said court may issue process directed to the person in whose custody or care the said accounts, books, documents or other papers may be, commanding him to deliver or transmit the same to said court, which process shall be served by the sheriff; and the said court may examine all parties and witnesses on oath, touching the investigation of any accounts, and if any person, being served with such process shall not appear according to the command thereof, without reasonable cause, or if any person in attendance at any hearing or proceeding shall, without reasonable cause, refuse to be sworn

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or to be examined, or to answer a question or to produce a book or paper, or to subscribe or swear to his deposition, he shall be deemed guilty of a misdemeanor; provided, that if the county court finds it necessary to do so, it may employ an accountant to audit and check up the accounts of the various county officers."

In the case of Jackson County v. Fayman, 44 S.W. (2d) 849, the county sued the county treasurer on his bond to recover the amount of a certain county warrant alleged to have been wrongfully paid by the treasurer in part payment for construction of a public road. The county had issued the warrant to the contractor, but later upon finding that the issuance of the warrant had been procured by false representations regarding the work performed the county court directed the treasurer not to pay the warrant. The county court upon investigation had determined that the contractor had already been paid that amount which was due him for the road construction work, and it was therefore contended that the warrant in question was without consideration and was issued in payment for work not performed. The Supreme Court in ruling on the question held that the decision of the county court to first issue the warrant was not final and binding and that the county court could thereafter change its decision and order the warrant not to be paid. The Supreme Court in rendering its decision undertook to discuss the power and authority of county courts in auditing and paying claims and recognized that the county court could investigate claims and exercise some discretion in the payment of same. At l.c. 852 the court said:

"The power and authority of county courts and the capacity in which such body acts in auditing and paying claims against the county has been before this court for decision many times. We think that it is now well settled that county courts do not act judicially in allowing, adjusting, or refusing claims presented against the county, or necessarily arising from managing its financial affairs. While such body does not act in a purely ministerial capacity in such matters, in the sense that they act without investigation and have no discretion in the matter, yet they do not try the merits of the claim as a court, but rather act as auditing financial agents of the county whose action is not final in the sense that a judgment of the court is final except on appeal or by other appropriate remedy."

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In the case of State ex rel. Becker v. Wehmeyer, 113 S.W. (2d) 1031, an attorney sought to mandamus the county court to compel it to issue a warrant for a specific sum as compensation for certain professional services allegedly to have been rendered by him. In deciding the matter the appellate court recognized the right of a public officer to compel the payment of a salary fixed by law as to a specific amount, but pointed out that this would not be true relative to a person other than a public officer who has a claim for fees or compensation for services rendered to the county. In ruling on the question the court, at l.c. 1033, 1034, said:

"But, while a public officer may rightfully have recourse to mandamus to compel the payment of a salary fixed by law as to amount, the same is not true of a person who has a claim for fees or compensation for services rendered to the county, where both the validity and the amount of the claim are subject to be put in issue. In such an event the county court is called upon to exercise its discretion in auditing and settling the claim, and the particular action it should take is therefore not to be decided by mandamus. Perkins v. Burks, supra.

"Relator's claim in the case at bar is precisely of the latter character. Not only are there questions of fact to be determined, but respondents have both the right and the duty of examining into the law with respect to the validity of the claim as a condition precedent to a finding that any indebtedness exists. They must not only find that the contract was made with relator, but, if so, that it was a contract which it was within their power to make. They must also find that relator's services were performed in compliance with the obligations of the contract. In short, they must exercise the discretion which has been vested in them with respect to the auditing and settling of claims against the county, with the result that they are not to be compelled to honor relator's claim by this manner of proceeding."

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In connection with your last question relative to the county assessor appointing his wife as a clerical or stenographic assistant, your attention is directed to Article VII, Section 6 of the Constitution of Missouri, which provides as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

The above section is substantially the same as Section 13, Article XIV of the Constitution of 1875.

In construing the nepotism section of the old Constitution the Supreme Court, in *State ex inf. Norman v. Ellis*, 28 S.W. (2d) 363, clearly held that a wife came within the degree of relationship set forth in the constitutional provision.

Inasmuch as Article VII, Section 6, *supra*, does include a relative named or appointed to employment by a public officer, we conclude that a county assessor would forfeit his office if he employed his wife as a clerical or stenographic assistant in his office.

CONCLUSION

It is, therefore, the opinion of this department that in third and fourth class counties the county assessor has the sole authority to appoint and fix the compensation of clerical or stenographic assistants as may be necessary for the efficient performance of the duties of his office, and that he has the power to determine the necessity for the appointment of said assistants.

It is our further opinion that before the county court could draw a warrant on the county treasury for the payment of assistants appointed by the county assessor the county assessor would first have to certify to the county court the names of the assistants appointed and the amount of salary or compensation to which they are entitled, based upon actual services rendered for a particular period of time. Upon receiving this certification the county court would be empowered to first determine whether or not the named assistants were actually appointed, whether or not they actually rendered the services for the time certified and whether or not the amount of the salary or compensation certified was within the statutory limit, before issuing a warrant.


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We further conclude that under the provisions of Article VII, Section 6 of the Constitution of Missouri, a county assessor would forfeit his office if he named or appointed his wife as an employee in his office in the capacity of a clerical or stenographic assistant.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RFT:lrt

COUNTY BUDGET LAW AS IT
AFFECTS JUVENILE COURT
IN COUNTY OF THE FIRST
CLASS:

County budget officer in county of the first class may not change original estimate of the circuit court, and county court's appropriation order must make appropriation in accordance therewith unless changed by consent of the circuit court.

January 12, 1951

Honorable Ray G. Cowan
Judge of the Juvenile Court
Jackson County
1305 Locust Street
Kansas City, Missouri



Dear Judge Cowan:

We have your recent letter in which you request an opinion of this department. Your letter is as follows:

"Will you kindly give me an opinion as to the law pertaining to the Circuit Court budget in counties of the population of Jackson County?

"I am having some disagreement with the county budget officer as to the budget for the operation of the Juvenile Court, which is a direct function of the Circuit Court. It is my understanding that the budget officer cannot interfere with the function of the Circuit Court."

Jackson County is a county of the first class.

Section 10919a, R.S.A. Mo. 1939, provides, in part, as follows:

"All counties that are now or may hereafter become counties of the first class shall be governed by the provisions of this act, and Sections 10925 to 10933, both inclusive, of Article 2, Chapter 73, of the Revised Statutes of Missouri, 1939.
* * * *"

Accordingly, said sections 10925 to 10933, inclusive, apply to Jackson County.

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Section 10931, Laws Mo. 1945, p. 603, one of the said applicable sections, is as follows:

"Except as in this section otherwise specified, all offices, departments, courts, institutions, commissions, or other agency spending moneys of the county, shall perform the duties and observe the restrictions set forth in the preceding sections relating to budget procedure and appropriations. The estimates of the circuit court, including all activities thereof and of the circuit clerk, shall be transmitted to the budget officer by the circuit clerk. The estimates of the circuit clerk shall bear the approval of the circuit court. The budget officer of the county court shall not change the estimates of the circuit court or of the circuit clerk without the consent of the circuit court or of the circuit clerk, respectively, but shall appropriate in the appropriation order the amounts estimated as originally submitted or as changed, with such consent."
(Underscoring ours.)

We are of the opinion that if the operation of the Juvenile Court of Jackson County is an activity of the Circuit Court the Juvenile Court of Jackson County comes within the meaning of that portion of the above-quoted statute which provides as follows:

"The budget officer of the county court shall not change the estimates of the circuit court or of the circuit clerk without the consent of the circuit court or of the circuit clerk, respectively, but shall appropriate in the appropriation order the amounts estimated as originally submitted or as changed, with such consent."

and that the budget officer of the county therefore cannot change the estimates made by your court without the consent of your court and that the appropriation order of the county court of Jackson County must appropriate the amounts estimated as originally submitted or as changed, with the consent of the court.

In view of the fact that the opinion last above expressed is contingent upon the proposition that the Juvenile Court of Jackson County is an arm of the Circuit Court, we must now determine whether that proposition is correct.

Article V, Sec. 1 of the Constitution of Missouri provides as follows:

"Sec. 1. Judicial Power--Constitutional Courts.-- The judicial power of the state shall be vested in a supreme court, courts of appeals, circuit courts, probate courts, the St. Louis courts of criminal correction, the existing courts of common pleas, magistrate courts, and municipal corporation courts."

Section 9674, Laws Mo. 1945, p. 626, is as follows:

"The circuit courts exercising jurisdiction in counties of the first and second classes shall have original jurisdiction of all cases coming within the terms of this article: provided, that in counties containing a city of the first class the criminal court shall have such original jurisdiction. For the purpose of this article, the city of St. Louis shall be considered a county within the meaning of this article. In counties where there are or may be more than one circuit judge, the judges of the circuit court in such counties shall designate one of their number, whose duty it shall be to hear and determine all cases coming under this article until there be another judge so designated: provided, that in case of the absence or inability of the judge designated to hold said court, any one of said judges may perform that duty; and provided, that in counties in which the criminal court has jurisdiction, the judge of the criminal court may, in case of his absence from the county or of sickness, call in any circuit judge of the judicial circuit in which such county is located and if the judge so called in, consent to act, said circuit judge shall during such absence or sickness have the same powers and perform the same duties as are imposed upon the judge of the criminal court under this article. A court room, to be designated the juvenile court room, shall be provided or assigned by the county or circuit court of such counties, as the case may be, for the hearing of such cases; and the proceedings of the court in such cases shall be entered in a book or books to be kept for that purpose, and known as the juvenile records, and the court may for convenience be called the juvenile court. The clerk of the circuit court in such county shall act as the clerk of the juvenile court. The practice and procedure prescribed by law for the conduct of criminal cases shall govern in all proceedings under this article in which the child stands charged with the violation of the

Honorable Ray G. Cowan

criminal statutes of the state and in such proceedings the child, his parent, or any person standing in loco parentis to him may on his behalf demand a trial by jury. In all other cases the trial shall be before the court without a jury, and the practice and procedure customary in proceedings in equity shall govern except where otherwise provided by this article."

Since Jackson County is a county of the first class, we are of the opinion that the work of the juvenile court of Jackson County constitutes an activity of the circuit court of Jackson County within the meaning of Section 10931, supra.

CONCLUSION

We are, accordingly, of the opinion that since the functioning of the juvenile court of Jackson County constitutes an activity of the circuit court the budget officer of that county cannot change the estimates made by the court without the court's consent and that the appropriation order of the county court must appropriate "the amounts estimated as originally submitted" or as changed with the consent of the court.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SMW:mw

HEALTH: House Bill No. 307 relating to county public
TAXATION: health centers is constitutional, and tax
CONSTITUTIONAL LAW: voted for when health centers were organized
under former law can be levied. Health
centers previously organized to continue
under management and control of board of
trustees as provided in House Bill No. 307.

July 2, 1951

7-6-51

Honorable James V. Conran
Prosecuting Attorney
New Madrid County
New Madrid, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department, which, in part, reads:

"We are now informed that the Legislature has passed and the Governor has signed, with an emergency clause, House Bill No. 307, which relates to County Health Centers, and which, they say, takes all the bugs out of the old law, and the State Health authorities are telling the Counties which voted for the tax under the old law that they may now proceed to operate. However, several doubts exist in our minds and we need an official opinion to straighten it out.

"1st. If a County had the required number of petitioners to file the request and an election was held under the old law, with better than 2/3 majority in favor, can the County now levy the tax and operate under the new law?

"2nd. Does the passage of the new law cure the defects of the old one and can the County Health Centers set up under the old law continue to legally operate, even after the appointment of trustees, without the filing of a new petition and the holding of another election?

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"3rd. For the purpose of calling a new election, may the old petition be withdrawn and refiled, so as to support the County Court in making an order for a new election, under the new law?

"4th. Is the new law Constitutional?"

You will recall that heretofore you have requested an official opinion of this office regarding the constitutionality of the Public County Health Center Law, RSMo 1949, Sections 205.010 to 205.150, inclusive. In answer to that request our opinion was submitted to you under date of January 22, 1951. In that opinion we held certain provisions of the law to be unconstitutional on two grounds:

1. That Section 205.040, RSMo 1949, providing for an official health organization which was in the nature of a public agency and the existence of which depended upon the voluntary acts of at least two hundred and fifty people forming said organization, was unconstitutional because it constituted an illegal delegation of legislative power to private individuals, in violation of Section 1, Article III of the Constitution of Missouri, which vests the legislative power in the General Assembly.

2. That the control and management of a county public health center and the property connected therewith was county business, and to lodge jurisdiction of such business with the official health organization instead of the county court was in violation of Section 7, Article VI of the Constitution of Missouri.

In connection with the first ground, our principal authority relied on was the case of State ex rel. Jones v. Brown, 92 S.W. (2d) 718, 338 Mo. 448, from which we quoted extensively.

We then pointed out that the purpose of the Public Health Center Law could not be carried out if the required number of citizens within the county or counties failed to voluntarily form the official health organization, and that the statute relying upon the voluntary acts of private citizens to bring said organization into existence was an illegal delegation of legislative power to private individuals, in violation of Section 1, Article III of the Constitution of Missouri.

With the enactment of House Bill No. 307 by the 66th General Assembly, that portion of the old law providing for the official health organization and its powers and duties in connection with the operation of the public county health center was repealed. In lieu thereof a board of health center trustees is provided for, consisting of five members to be first appointed

Honorable James V. Conran

by the county court and thereafter to be elected beginning with the next general election. Thus Section 205.030 of House Bill No. 307, in part, provides:

"The county court shall appoint five trustees chosen from the citizens at large with reference to their fitness for such office, all residents of the county, not more than three of the trustees to be residents of the city, town or village in which the county health center is to be located, who shall constitute a board of trustees for said county health center.

"2. The trustees shall hold their offices until the next following general election, when five health center trustees shall be elected who shall hold their offices, three for two years and two for four years. The county court shall by order of record specify the terms of said trustees.

"3. At each subsequent general election the offices of the trustees whose terms of office are about to expire shall be filled by the election of health center trustees who each shall serve for a term of four years.

"4. Any vacancy in the board of trustees occasioned by removal, resignation or otherwise shall be reported to the county court and be filled in like manner as original appointments, the appointee to hold office until the next following general election, when such vacancy shall be filled by election of a trustee to serve during the remainder of the term of his predecessor."

Section 205.040 of said bill provides for the manner in which candidates for health center trustees shall file for said office and for the manner in which they shall be elected.

Section 205.045 of said bill provides for the trustees appointed or elected taking an oath; provides for the organization of the board and the election of a chairman and secretary; provides for the county treasurer acting as treasurer of the board of trustees and, as such, his duties; and further provides for the powers and duties of the board of health center trustees in connection with the operation of the county health center.

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It is therefore apparent that under the provisions of House Bill No. 307 the control, management and administration of the public county health center is no longer sought to be vested in an organization the existence of which is dependent upon the voluntary acts of a certain number of individuals banding together to form same, and therefore the infirmity of the old law which we declared to exist relative to the first ground of unconstitutionality is no longer present.

The second ground upon which we considered the old law to be unconstitutional was based largely upon the decision of the Supreme Court of Missouri in the case of State ex rel. Bucker v. McElroy, 274 S.W. 749, 309 Mo. 59, which was cited and copiously quoted in the opinion first submitted to you. In that case the court was construing Section 36, Article VI of the Constitution of Missouri of 1875, which, in part, provides:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. * * *"
(Emphasis ours.)

Again in the Bucker case, at l.c. 751, the court said:

" * * * But what we want to emphasize is the fact that the court is of constitutional origin, and its jurisdiction fixed by the Constitution. In the language of the organic law, such court 'shall have jurisdiction to transact all county * * * business.' Other business may be added to its jurisdiction by law, but no law can take from it that which the Constitution expressly gives; * * *"

However, in the Constitution of Missouri of 1945 the language contained in Section 7 of Article VI is somewhat different from that appearing in Section 36 of Article VI of the Constitution of 1875. Thus Section 7, in part, provides:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. * * *"

Honorable James V. Conran

You will note in reading the above-quoted provision that immediately following the words "county business" the words "as prescribed by law" appear, and the words "such other business" as appeared in Section 36 of Article VI of the Constitution of 1875, which the court was construing in the Bucker case, are now omitted.

Since the adoption of the Missouri Constitution of 1945 the Supreme Court has undertaken to distinguish the Bucker case in declaring the power of the county court to manage the county business. This distinction is one which we overlooked and failed to present in our first opinion. In the case of State ex rel. Kowats v. Arnold, 204 S.W. (2d) 254, 356 Mo. 661, the court, at S.W. l.c. 259, said:

"We have traced the history of our law on this subject rather fully to show the background when the Constitution of 1945 was adopted. Under the Constitution of 1875 both the probate courts and the county courts were constitutional courts, and the statutory law for both ran parallel. As we said in the Downey case, supra, their spheres then were somewhat different. But now, under the Constitution of 1945 the powers of the county courts have been narrowed and their status changed. * * *

* * * * *

"Respondent's motion for rehearing invokes State ex rel. Buckner v. McElroy, 309 Mo. 595, 608, 274 S.W. 749, 751, which was not cited below in the Probate Court's memorandum, or in our opinion. It ruled Sec. 6, Art. VI, Const. Mo. 1875, Mo. R.S.A., vested in the county courts 'jurisdiction to transact all county * * * business,' and specifically and sole authority to manage and pay the maintenance costs of specified public institutions for the protection, care and education of delinquent and dependent children, to the exclusion of a Board of Paroles composed of circuit judges, created by a statute. That was true then, but as pointed out in the principal opinion, county courts are not constitutional courts

Honorable James V. Conran

now, and Sec. 7, Art. VI, Const. 1945, Mo. R.S.A., only gives them power to manage all county business as prescribed by law. They may be abolished altogether in certain counties. * * *

From the above decision it is apparent that under the present constitutional provision the powers of the county court to manage county business has been considerably limited, and the county court is now only given such power to manage county business as may be prescribed by law.

As a matter of fact, the Supreme Court of Missouri in a decision subsequent to the Bucker case, but before the adoption of the 1945 Constitution, undertook to limit the jurisdiction of the county court. In State ex rel. Walther v. Johnson, et al., 173 S.W. (2d) 411, 351 Mo. 293, the Supreme Court, en Banc, quoting from an earlier decision, said at S.W. 1.c. 413:

"In State v. Corneli, 347 Mo. 1164, 152 S.W. 2d 83, 85, this court, in discussing the constitutional powers of the county court, said: 'We concede that the county court is created as a court of record and its jurisdiction partially fixed by the constitution. Section 36 of Article VI of the Missouri Constitution Mo. St. Ann. vests such court with "jurisdiction to transact all county and such other business as may be prescribed by law." But the authorities are uniform to the effect that county courts possess only limited jurisdiction. Outside the management of the fiscal affairs of the county, such courts possess no powers except those conferred by statute.' * * *

In view of the foregoing authorities we are now constrained to the view that the provisions of House Bill No. 307 lodging the control, management and administration of the public county health center with a board of trustees is not in violation of Section 7, Article VI of the Constitution of Missouri, 1945, and it was within the power and authority of the Legislature to so provide. Such being the case, the second ground of unconstitutionality contained in the opinion first submitted to you is no longer existent.

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Consequently, with the infirmities upon which we heretofore declared the old law unconstitutional now removed, we are of the opinion that House Bill No. 307 is constitutional.

In connection with your first question, we note that Section 205.010, RSMo 1949, which provided for the levy of a tax, in part, reads:

" * * * which tax shall not exceed one mill on the dollar, for a period of time not exceeding twenty years, and be for the issue of county bonds to provide funds for the purchase of a site or sites, the erection thereon of a public health center and for the support of the same including necessary personnel, * * * "

It was under the authority of the above statute that the petitioners to which you refer acted in presenting their petition and subsequently voting to establish a public county health center and to levy a tax therefor. You will note in reading our former opinion that we did not declare the above statute unconstitutional.

Although Section 205.010, supra, has been repealed by the enactment of a section of the same number, contained in House Bill No. 307, we do not believe that said repeal renders nugatory the acts already done and performed by the voters of a particular county toward the formation of a public county health center.

In this connection your attention is directed to Section 1.150, RSMo 1949, which provides as follows:

"When a law repealing a former law, clause or provision shall be itself repealed, it shall not be construed to revive such former law, clause or provision, unless it be otherwise expressly provided, nor shall any law repealing any former law, clause or provision be construed to abate, annul or in anywise affect any proceedings had or commenced under or by virtue of the law so repealed, but the same shall be as effectual and be proceeded on to final judgment and termination as if the repealing law had not passed, unless it be otherwise expressly provided."

(Emphasis ours.)

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It is further apparent that House Bill No. 307 was enacted for the purpose of remedying any defects that were supposed to exist in the former law. This is manifested in the emergency clause of the act, which provides as follows:

"Whereas, questions have been raised as to the constitutionality of certain provisions of the existing county health center law, causing some counties, whose citizens desire to establish county health centers, to refrain from doing so to the detriment of the public health of such counties, and causing some concern in counties now operating health centers; therefore, this act is declared necessary for the immediate preservation of public peace, health and safety, and an emergency exists within the meaning of the constitution. Therefore, this act shall be in full force and effect from and after its passage and approval."

Furthermore, House Bill No. 307 is hardly more than a revision of the former act, and both relate to the same subject matter.

In the case of State ex rel. Stone v. The County Court of Vernon County, 53 Mo. 128, a mandamus proceeding was instituted to compel the county court to district the county into four districts for the purpose of electing justices to constitute the future county court and to order an election therefor. In 1872 an act had been passed to provide for the organization of counties in municipal townships and to provide for the local government thereof. Under that act a petition was presented and the matter was submitted to the voters of the county. Consequently, the county court divided the county into suitable townships to meet the requirements of the people, but later, in 1873, refused to district the county and to order an election of justices upon the ground that a later act passed in 1873 specifically repealed the act of 1872. In deciding the question the court, at l.c. 131, 132, said:

" * * * There is no doubt of the correctness of the general rule, that lege posteriores priores contrarias abrogant. But this rule has its limitations.

"The act of 1873 is really nothing more than a revision of the act of 1872. Some of the provisions in the two acts are identical, and they all relate to the same

subject matter. The purpose of the later enactment was to remedy defects that were supposed to exist in the former. The subsequent law was not designed to interrupt the continuity of the first act, so as to avoid or annul proceedings commenced under it.

"By the first section of article 17, in the act of 1873, (Sess. Acts. 1873, p. 120,) it is provided, that the County Court in each county having adopted the township organization, at their first meeting after the adoption of the act shall proceed to district their respective counties, as directed in article fifteen, for the purpose of electing County Court judges, and shall appoint a day for the purpose of electing the same. Then after making various provisions, not necessary to be here noticed, the 6th section declares, that an act entitled, 'an act to provide for the organization of counties into municipal townships, and to further provide for the local government thereof,' approved March 18, 1872, is hereby repealed.

"This last section does, in terms, repeal the former law, but the effect is not to be ascribed to it of completely annulling all proceedings commenced when the former law was in force. * * * As a law existed providing for township organization before, and the provision for putting it in force is essentially the same in both acts, the latter law must be construed as a mere continuation of the former, and one vote of the people is sufficient. But after the passage of the act of 1873 all subsequent proceedings must conform to it.

"Under the law the repeal did not affect or render nugatory the acts done, for the statute expressly provides, that the repeal of any statutory provision shall not affect any act done or right accrued or established in any proceeding; but that every such act, right and proceeding, shall remain as valid and effectual as if the provisions so repealed had remained

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in force, (W. S. 895, Sec. 5,); as the repealing section did not affect or impair the vote of the people of Vernon county in adopting the law in favor of township organization, it results that the law was then in full force, and that the new act simply gave it application and direction." (Emphasis ours.)

You will note that the court in the above case relied upon the provisions of the statute which now appear in Section 1.150, supra.

In the case of State ex rel. Wayne County v. Hackmann, 199 S.W. 990, there was involved a proceeding in mandamus to require the State Auditor to register bonds. Under authority of certain statutes of 1909 the County Court of Wayne County had issued certain road bonds. The preliminary steps necessary to authorize the issuance of the bonds, in conformity with the statute then in force, had been complied with, but the bonds were not actually issued until after the repeal of the statutes under which the action was originally taken. The bonds were subsequently sold and registered. After the repeal of the statutes authorizing the bond issue the county court sought to issue refunding bonds to retire the bonds previously issued, and it was the refunding bonds which were refused registration. In ruling on the question the court, at l.c. 991, 992, said:

" * * * No special saving clause was attached to the repealing act. Except by way of emphasis to give explicit application to general laws, such special saving clause was unnecessary. A repealing statute which, construed alone, would paralyze partly executed powers, is, under our legislative system, so modified by sections 8060 and 8062, R.S. 1909, as to perpetuate such powers to the extent of authorizing the completion or consummation of the purpose sought to be effected under a former law. Section 8060 so far as applicable to the case at bar is as follows:

"Nor shall any law repealing any former law, clause or provision be construed to abate, annul, or in any wise affect any proceedings had or commenced under or by virtue of the law so repealed, but the same shall be as effectual and be proceeded on to final judgment and termination, as if the repealing law had not passed, unless it be otherwise expressly provided."

"This court, in *Rogers v. Railroad Co.*, 35 Mo. 153, discussing a question as to the modifying effect of said section upon a repealing statute, said, in effect, that this provision (section 8060) preserves the relator's right of action notwithstanding the repeal of the statute under which the right was given. The Legislature, however, not satisfied with leaving the validity of acts done to implication, where the facts in regard to a repeal were as in the case at bar, enacted section 8062, which provides that:

"The repeal of any statutory provision shall not affect any act done or right accrued or established in any proceedings, suit or prosecution, had or commenced in any civil case previous to the time when such repeal shall take effect; but every such act, right and proceeding shall remain as valid and effectual as if the provision so repealed had remained in force."

"These sections, construed together, so modify a repealing statute as to not only render valid initiatory or preliminary acts in the exercise of a power conferred by a former statute, but authorize such subsequent acts as may be necessary to effect the purpose originally contemplated.
* * * The limitation of the operative effect of these sections to judicial transactions as contended for by respondent is not in accord with their terms nor with the evident purpose of their enactment. Their general nature authorizes the conclusion that they were intended to continue in force repealed laws until proceedings commenced thereunder, regardless of their nature, might be completed. * * *

"* * * Although there was an express repeal of the former statute the immediate re-enactment of same, except as to the changes noted, left, so far as the practical application of the law is concerned, the same power in the county court. Under these conditions, although the latter law does in terms repeal the former, the effect is not

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to be ascribed to it of annulling all proceedings commenced when the former law was in force. The operative force of both laws being essentially the same, the latter may properly be construed to be a continuance of the former; * * *" (Emphasis ours.)

Section 205.046 of House Bill No. 307 provides as follows:

"In those counties of the state now operating county health centers pursuant to the provisions of this chapter, the county court of each such county shall immediately appoint a board of trustees as provided in section 205.030, who shall hold office until the next following general election, at which election trustees shall be elected as provided in said section 205.030. All funds and property of any health center now operating shall be turned over to the board of trustees hereby created upon the effective date of this act and all contracts, gifts and obligations by or to such health center may be enforced by or against said board of trustees after this act becomes effective."

It is apparent in reading the above section that it was the legislative intent to continue the operation of county health centers previously organized and to place such health centers under the control and supervision of a board of trustees. In other words, it appears to be the plain intent of the Legislature for any action commenced under the provisions of the old law in regard to the organization of a public health center to be continued under the supervision and control of the board of trustees.

In view of the authorities above cited showing that action commenced under the former law toward the organization of county public health centers and the levying of a tax to provide funds therefor may be continued, although certain sections of the former law are repealed, and considering the legislative intent to continue in existence health centers previously organized, we are constrained to answer your first question in the affirmative.

In answer to your second question, we believe that we have adequately pointed out that House Bill No. 307 cures the defects of the former law which we at one time thought to exist, and under the provisions of Section 205.046, supra, it appears that a county health center previously organized can continue to

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legally operate under the supervision, control and management of a duly appointed board of trustees. Furthermore, the law is silent on the filing of any new petition or for the holding of another election in connection with county health centers already organized.

In answer to your third question, there is no provision in House Bill No. 307 requiring a new petition be filed and another election be held in connection with county health centers already organized. The law only provides for the filing of petitions and the holding of elections in counties desiring to establish a public health center, and which have not already done so.

CONCLUSION

In the premises, it is the opinion of this department that House Bill No. 307, relating to public health centers, is constitutional and cures the defects which may have previously existed in the former law also relating to public county health centers.

In those counties where action has already been taken to organize public health centers, to levy a tax and to provide funds therefor, the continued operation, management and control of said health centers shall be under a duly appointed board of trustees.

The tax previously voted under the authority and for the purpose as declared in the former law can continue to be levied without the filing of another petition or holding of another election.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

FACSIMILE SIGNATURE:

A facsimile signature when authorized by a party to an agreement is binding upon such party.

September 18, 1951

9/19/51

Mr. Francis M. Cook
Regional Attorney
Department of Labor
3000 Federal Office Building
Kansas City 6, Missouri



Dear Sir:

You recently requested an opinion from this office, which request reads in part as follows:

"Under a recent law enacted by Congress and an international agreement with the Mexican Government, contractors of your state and individual Mexicans have entered into work agreements. The United States Government signs these agreements as guarantor.

"It has been the practice that the contractor, due to the large number of individual contracts, has used a facsimile signature on these work agreements. In addition, however, they have actually signed another agreement that they have read the international agreement and the work contract, and that they have authorized the use of their facsimile signature on the work contracts.

"Will you please give me your official opinion whether the use of the facsimile signatures under the conditions stated above will bind the contractor under the law of your state."

As you have noted in your opinion request the rule in regard to signatures on contracts not under the statute of frauds is found

Mr. Francis M. Cook

in 17 C. J. S., Contracts, page 410, and is stated as follows:

"Signature is not always essential to the binding force of an agreement. The object of a signature is to show mutuality or assent, but these facts may be shown in other ways, and in the absence of a statute or arbitrary rule to the contrary, it need not be signed, provided it is accepted and acted on, or is delivered and acted on."

We have been unable to find any authority requiring a signature of a party to a contract other than contracts under the statute of frauds or others specifically designated by statute.

In the case of City of Maplewood v. Johnson, 273 S.W. 237, certain instruments were signed with a rubber stamp signature and the court in its opinion said:

"The name of the corporation was rubber stamped on the tax bills. Whether the president or the secretary of the contractor affixed it, the record does not show. It does show, however, that the president was present, and it may be inferred that he saw that it was so affixed, and consented and intended that it act as the signature of the corporation in the matter of the assignment."

Even a memorandum required to be signed under the statute of frauds does not require the actual signature of the party to be charged. In discussing such a memorandum in the case of Dinuba Farmers' Union Packing Co. v. Anderson Grocer Co., 193 Mo. App. 236, 1. c. 247, the court said:

"Indeed, the name of the party to be charged may be either in writing or in print or by stamping the name upon the memorandum. ***"

We are of the opinion that under the above cited authority even if a signature is required on the "work agreement" a facsimile signature such as you have suggested would be sufficient since the contractor has authorized the use of a facsimile signature.

Mr. Francis M. Cook


CONCLUSION

Therefore, it is the opinion of this department that a "work agreement" bearing a facsimile signature of a Missouri contractor is binding upon said contractor when he has authorized the use of such signature on such agreement.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

DDG:hr

APPROPRIATIONS:

BI-STATE DEVELOPMENT AGENCY:

Sec. 4, S.B. 99, 65th General Assembly does not prohibit 66th General Assembly from passing appropriation act effective on or before December 31, 1951 for use of Bi-State Development Agency. Such appropriation may be lawfully obligated during fiscal period described in appropriation act.



November 20, 1951

11-20-51

Honorable Bert Cooper
Director, Department of Business and Administration
State Office Building
Jefferson City, Missouri

Dear Sir:

The following opinion is rendered in reply to your recent inquiry reading as follows:

"The 65th General Assembly in Senate Bill No. 99, enacted a law 'Providing for the State of Missouri to enter into a compact with the State of Illinois for the establishment of a Bi-State Development District and the creation of a Bi-State Development Agency; and setting forth in full the terms of such compact, with an emergency clause.'

"In Section IV of this law, as shown on Page 562 of the 1949 Laws of Missouri recites:

'Provided, that no appropriation of moneys from state funds in support of the Bi-State Agency herein created or in support of the project provided for in the compact herein set out shall ever be made by the State of Missouri after December 31, 1951.'

"From the reading of the foregoing, it appears that the Legislature could make an appropriation for this purpose up to and including the expiration date. Also, under the terms of the Constitution, Article IV, Section 28, the Bi-State Development Agency would have until July 1, 1953 for making expenditures under

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the terms of the appropriation and a six months period thereafter for any anticipated expenditures that were committed on the Comptroller's books prior to July 1, 1953.

"The House of Representatives, in making its appropriation for this Agency, made it for a period beginning July 1, 1951 and ending June 30, 1953. When House Bill No. 5, Section 4.370 reached the Senate, the appropriation was cut from \$24,850.00 to \$6,250.00, with some of the Senators giving the opinion that under the terms of Senate Bill No. 99, Section IV, no expenditures could be made by this Agency after December 31, 1951.

"To me, this does not seem to follow out the purpose of the law or the Constitution.

"I am soliciting you for a Legal Opinion, as follows:

- "1. Can the Legislature make an appropriation for the use of the Bi-State Development Agency between now and December 31, 1951 for a sufficient amount for it to function for the remainder of this biennial period?
- "2. If such appropriation is made, can the Comptroller legally approve such requisitions that may be made for expenditure of the appropriation during the remainder of this biennial period?

"In as much as the Legislature is now in session and may adjourn soon, I would appreciate your early attention to this matter."

The Constitution of 1945 made marked changes in the handling of state finances. Theretofore appropriations had been made for biennial periods, that is, for periods of two calendar years. The Constitution of 1945 prescribed a fiscal year for the state which runs from July 1 of one year to June 30 of the following

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year. Section 23 of Article IV of such Constitution provides:

"The fiscal year of the state and all its agencies shall be the twelve months beginning on the first day of July in each year. The general assembly shall make appropriations for one or two fiscal years, * * *."

Under the foregoing quoted provision of the Constitution it is within the power of the General Assembly to limit its appropriation to one or two fiscal years. Once the appropriation is made it runs for the period referred to in the appropriation bill. Expenditure of such an appropriation is governed by Section 28 of Article IV of the Constitution which provides:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

The last sentence in the preceding quotation provides that "no appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates." That is to say, that at any time during the fiscal period or periods for which an appropriation is made, obligations can be incurred against said appropriation, but such obligations cannot be incurred after the expiration of said fiscal period or periods. The appropriation itself does not expire until six months after the end of the fiscal period or periods for which it was made.

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That means that the appropriation is available for six months beyond said fiscal period or periods for the payment of obligations which were legally incurred during such period or periods. In other words, obligations incurred on behalf of the state must be paid out of appropriations made for the period or periods in which said obligations are incurred, and if such obligations are legally incurred, they can be paid at any time during said period or periods and six months thereafter.

Section 4 of Senate Bill No. 99, passed by the 65th General Assembly, does contain the proviso as quoted above in the opinion request. Without determining what force and effect this proviso may have as a prohibition directed to General Assemblies succeeding the 65th General Assembly, we accept the language of such proviso as written and give to it the ordinary and accepted meaning conveyed by the language used. Such proviso reads as follows:

"* * * Provided, that no appropriation of moneys from state funds in support of the Bi-State Agency herein created or in support of the project provided for in the compact herein set out shall ever be made by the State of Missouri after December 31, 1951."

The clear language used in the proviso quoted above does nothing more or less than prohibit an appropriation subsequent to December 31, 1951. In the case of *Allen v. City of Cambridge*, 55 N.E. (2d) 925, the Supreme Judicial Court of Massachusetts had before it a statute providing

"'during the period covered by this act
* * * no * * * increase in salary except
regular step-rate increases, shall be
made in any appointive office, position
or employment in the service of said city.'"

The court said, l.c. 928:

"* * * Whenever the increase was to take effect, the increase was 'made' by ordinances enacted within the period during which any such increase of salary was forbidden by the statute. * * *"

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If the present 66th General Assembly desires to pass an appropriation act within the time limit set forth in the proviso, certainly no violation thereof would be evident.

CONCLUSION

It is the opinion of this department that the 66th General Assembly may make an appropriation by an enactment effective on or before December 31, 1951 for the use of the Bi-State Development Agency, without contravening the directive found in Section 4 of Senate Bill No. 99, passed by the 65th General Assembly, and expenditures from such appropriation may be made to cover obligations legally incurred during the fiscal period set out in the appropriation act, such period not to exceed two years after July 1, 1951.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:ba

APPROPRIATION:

BI-STATE DEVELOPMENT
AGENCY:

Effective date of appropriation act determined by Section 1.130, RSMo 1949. Senate Bill No. 99, 65th General Assembly may not be amended by an appropriation act.

12-7-51



December 3, 1951

Honorable Bert Cooper, Director
Department of Business and Administration
State Office Building
Jefferson City, Missouri

Dear Mr. Cooper:

The following opinion is rendered in reply to your request of November 26, 1951, reading as follows:

"Due to the present prevailing condition of the work of the General Assembly, indications are that House Bill No. 496, will not be passed before January 1, 1952. For that reason the opinion furnished us on November 23 is not adequate; hence we are obliged to ask for an additional opinion as follows:

"The specific piece of legislation in which we are interested is Section 10.840 of House Bill No. 496 which reads in part, 'there is hereby appropriated * * * the sum of twelve thousand five hundred dollars, \$12,500, to the Bi-State Development Agency * * * for the biennial period beginning July 1, 1951, and ending June 30, 1953. The foregoing amount is in addition to the amount appropriated for the same purpose enacted in Section 4.370 of House Bill No. 5 an act of the 66th General Assembly'. The reasonable assumption is that the bill (or some modification thereof) will not be passed until after December 31, 1951, and what we would like to know is whether

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passage of such a bill after December 31, 1951 would be valid in view of the proscriptions contained in Section IV of Senate Bill No. 99 of the 65th General Assembly. In the event that such enactment subsequent to December 31, 1951, is legal, would the funds so appropriated be available to the Agency for the period beginning January 1, 1952?

"The above questions are raised because it is felt that some clarification is needed in the conclusion expressed in the Attorney General's opinion mentioned above. That conclusion states that the '66th General Assembly may make an appropriation by an enactment effective on or before December 31, 1951'. We are uncertain whether this means that the appropriation act must be passed, signed by the Governor, and become effective before December 31, 1951, or whether on the other hand passage subsequent to January 1, 1952 would make the funds available for the period beginning January 1, 1952 in view of the fact that the bill itself states that the appropriation is for the biennial period beginning July 1, 1951.

"In as much as we need the answer requested to use in the Committee hearing before the Senate, we will appreciate an opinion at the earliest date possible."

Relative to the conclusion stated in our opinion of November 20, 1951, we do not feel that such conclusion needs clarification but that it fully and adequately disposes of the inquiry to which it was addressed. In this opinion we direct our rulings to (1) the effective date of an appropriation act and (2) whether an appropriation act to be passed subsequent to December 31, 1951, for the purpose of maintaining the Bi-State Development Agency created by Senate Bill No. 99 of the 65th General Assembly would, without a separate mandatory act directed to Senate Bill No. 99, make funds available to the Bi-State Development Agency subsequent to December 31, 1951.

The effective date of an appropriation law is clearly disclosed in Section 1.130, RSMo 1949, which provides as follows:

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"A law passed by the general assembly shall take effect ninety days after the adjournment of the session at which it is enacted; provided, however, if the general assembly recesses for thirty days or more, it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of the recess, subject to the following exceptions:

"(1) A law necessary for the immediate preservation of the public peace, health or safety, which emergency must be expressed in the body or preamble of the act and which is declared to be thus necessary by the general assembly, by a vote of two-thirds of its members elected to each house, said vote to be taken by yeas and nays, and entered on the journal, or a law making an appropriation for the current expenses of the state government, for the maintenance of the state institutions or for the support of public schools, shall take effect as of the hour and minute of its approval by the governor; which hour and minute may be endorsed by the governor on the bill at the time of its approval;

"(2) In case the general assembly, as to a law not of the character herein specified, shall provide that such law shall take effect on a date in the future subsequent to the expiration of the period of ninety days herein mentioned, said law shall take effect on the date thus fixed by the general assembly.

"(3) In case the general assembly shall provide that any law shall take effect as provided in subsection (1) of this section, the general assembly may provide in such law that the operative date of the law or parts of the law shall take effect on a date subsequent to the effective date of the law."

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Subparagraph (1) of the above quoted statute discloses the effective date of an appropriation act, and subparagraph (3) of such section authorizes the general assembly to postpone the effective date of such a law.

Section 4 of Senate Bill No. 99, passed by the 65th General Assembly contains the following proviso:

"Provided, that no appropriation of moneys from state funds in support of the Bi-State Agency herein created or in support of the project provided for in the compact herein set out shall ever be made by the State of Missouri after December 31, 1951."

Senate Bill No. 99, supra, is a general law and not an appropriation act. It is clearly evident from reading the proviso contained in Section 4 of the act that the legislature did not intend that the State of Missouri should be obliged to make an appropriation out of public funds subsequent to December 31, 1951, for the support of the Bi-State Agency created by such act. This statute cannot be repealed or amended except by subsequent general legislation.

Section 23 of Article III of Missouri's 1945 Constitution provides as follows:

"No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated."

The above quoted constitutional provision represents a change in form but no change in substance of Section 28, Article IV of the Missouri Constitution of 1875, which was under scrutiny by the Supreme Court of Missouri in the case of State of Missouri ex rel. v. Forrest Smith, State Auditor, 75 S.W. (2d) 828, 335 Mo. 1069. In such case the court disclosed why an appropriation act may not amend a general statute. In the opinion we find the following language at 335 Mo. 1069, l.c. 1073:

"* * * Besides, legislation of a general character cannot be included in an appropriation bill. If this appropriation bill had attempted to amend Section 13525

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it would have been void in that it would have violated Section 28 of Article IV of the Constitution which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no doubt but what the amendment of a general statute such as Section 13525, and the mere appropriation of money are two entirely different and separate subjects."


CONCLUSION

House Bill No. 496, now pending before the 66th General Assembly will have its effective date determined by Section 1.130, RSMo 1949, and the passage of such appropriation act subsequent to December 31, 1951, will be ineffective to amend Senate Bill No. 99, of the 65th General Assembly.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

JLO'M:ba

COUNTY COURTS:
COURTHOUSES:
PROBATE COURTS:
MAGISTRATE COURTS:

County courts must furnish probate and magistrate courts adequate office and storage space, office furniture, equipment, appliances and supplies.

County courts do not have authority to lease or permit the use of space in the county courthouse for private purposes.

February 13, 1951

FILED 20

Honorable James E. Curry
Prosecuting Attorney
Douglas County
Ava, Missouri



Dear Sir:

Receipt of your letter of recent date is acknowledged, requesting an official opinion of this department on two subjects. Your letter reads as follows:

"At the request of Hon. Quentin Haden, Probate Judge of Douglas County, I am requesting an opinion from your department relative to the obligation of the County Court to provide office facilities for both the Judge and the Court.

"At the present time the office of the Probate Judge is located in a single room in the courthouse, and the records of the court are contained in open filing shelves in the same room. There is no vault available in that office, and there is no private office for the judge. At present there is inadequate space in the office for the necessary books.

"Also at the present time there is available in the courthouse an office which is accommodated by a vault and is large enough and spacious enough to take care of the court and its records. However this office is under a ten year lease granted by the county court to a private individual for private purposes.

"There is some question in the mind of the Probate Judge as to the validity of

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a long term lease to a private individual for private purposes when such office in a county courthouse, in his opinion, is necessary to carry on and conduct the business and affairs of the county and state, especially when the office of Probate Judge and Magistrate under the law of 1945 is deemed a court of record. As a court of record the Probate Judge feels that he is entitled to a vault for the safe preservation of the records of his office."

We discuss the questions presented in the order stated in your letter.

1. Section 49.130, RSMo. 1949, provides in part:

"The county court in each county in this state shall erect and maintain at the established seat of justice a good and sufficient courthouse, jail and necessary fireproof buildings for the preservation of the records of the county. * * *"
(Emphasis ours.)

Section 49.470, RSMo. 1949, provides as follows:

"The county court of each county shall have power, from time to time, to alter, repair or build any county buildings which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage." (Emphasis ours)

Relating to judges of magistrate courts, Laws of Missouri, 1945, p. 770, Section 6, reads:

"In counties of 30,000 inhabitants or less, the probate judge shall qualify as judge of the magistrate court and his failure or refusal to do so shall constitute a vacancy in both the office of probate judge and the office of judge of the magistrate court."

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Section 19 of the same Laws provides in part that:

"Magistrate courts shall be courts of record. * * *"

Section 14, 1945 Laws, p. 772, is as follows:

"Every magistrate may hold court for the trial of all causes of which he has jurisdiction as often as may be necessary to meet the needs of justice, and may hold such court on any day, except Sunday, on which any cause may be set and for trial, or any cause adjourned; and when so required the sheriff shall be present in person or by deputy and attend on said court."

Section 18 of same Laws, p. 774, with reference to the location of the magistrate courts in counties having a population such as Douglas County, provides:

"The county seat shall be the seat of the magistrate court, and the county court may, by proper order, provide an additional place or places in the county for the holding of magistrate court; provided however that in counties of the first class the county court may by proper order establish the seat of any magistrate court at some place within the county other than at the county seat."

Section 49.510, RSMo. 1949, being in force at the effective date of the Magistrate Court Act and apparently applying to any county office, reads as follows:

"It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the duties and functions of their respective offices. Said county shall maintain, furnish and equip, said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and

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paid out of the county treasury of said county at the time and in the manner that the county court may direct." (Emphasis ours.)

The statutory provisions above quoted serve as mandates by the legislature on county courts in order to secure and insure the proper functioning of county offices and the prompt and efficient transactions of the public business committed to them by the laws of the state. The statutes as to their command are general in nature, leaving it to the sound judgment of the members of the county court, aided by the advice of affected officials, in carrying the same into effect, keeping in mind the purpose and spirit of the law in that regard.

Wills, records, files and other papers that direct or have to do with the devolution of title to real and personal property, together with the files and records concerning the administration of estates and all of the incidents thereto, are housed and kept in the offices of the probate court in the respective counties throughout the state. Records as to the institution of civil actions and proceedings involving prosecutions for alleged violations of criminal laws of the state are kept in the offices of magistrate court. Undoubtedly, it is the duty of the county court to provide a vault, or a steel or iron safe or other similar installation, in which such records, files and papers may be preserved and protected from outside interference and damage or destruction. The foregoing may be accomplished by installations in the courthouse itself or by means of a separate structure in close proximity to the courthouse, erected for such storage and protective purposes.

It is a matter of common knowledge that certain hearings are held by the probate and magistrate courts for which juries may be called and at which witnesses are required to attend and at which interested parties have a right to be present. The county court, in determining the amount of space to be furnished the probate and magistrate courts, should have the foregoing conditions and necessities in mind, together with the space necessary for the transaction of the regular and ordinary business of such courts. Likewise, the county court should supply the probate and magistrate courts with such necessary office, furniture, appliances and equipment as will enable such courts to properly transact the business of such offices with accuracy and dispatch and to keep proper records and files of the proceedings thereof.

The arrangement of courthouses in the respective counties and available space, considering the proper needs and demands

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of other county officials, necessarily presents its own and a different problem to be solved by each county court. Within the space available in the county court house for the use of county offices or such additional space as may be legally provided by the county court, it is the duty of such court to give effect to the foregoing provisions of the law, and such court may be compelled to do so in the event of a disregard of its duties.

2. Referring to the purported lease of space in the courthouse of Douglas County to a person or persons for private purposes, we have heretofore pointed out sections of the statute law of the state giving the county court care, control and custody of courthouses and the county property therein. There is no statute in this state providing that county courts cannot lease space in the courthouses for private purposes, but such provision may be read into the law by implication.

It is a matter of common knowledge that courthouses over the state generally are now crowded for space to be used for public purposes, which excludes any thought that it was the intention of the legislature that courthouses are to be used for purposes other than those in which the public as such generally has an interest.

The rule in this respect is stated in Sparks v. Purdy et al, 11 Mo. 219. The Supreme Court of this state at page 224 of the opinion stated:

"The law intrusts the County Court with the control and management of the property, real and personal of the county; and under this power the court superintends the public buidings. Public convenience requires that a summary power to prevent the illegal occupation of, and to eject trespassers from the places designed for the transaction of the business of the county should exist in some body."

The Supreme Court of Missouri in 1923 in the case of King v. Maries County, 293 Mo. 488, 249 S.W. 418, defined the powers of the county courts as follows:

"It has been held uniformly that county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. They

Honorable James E. Curry

February 13, 1951

have only such authority as is expressly granted them by statute."

The general rule governing the authority to rent public property for private use is stated in 63 A.L.R. 614, as follows:

"It seems to be universally recognized that municipal corporations can exercise no powers which are not in express terms, or by fair and reasonable intendment, conferred upon them, and hence such corporations have no power to rent municipal property to private persons, in the absence of a charter provision or statutory enactment empowering them to do so either in express terms or by necessary intendment."

This principle is also stated in State ex rel. Scott v. Hart, 144 Ind. 107. In the course of that opinion the court said:

"The board of commissioners is authorized to purchase and own the real estate upon which the court house is erected, for that purpose, which is a public purpose, and has no power to use or lease the same or any part thereof to be used for any private purpose, unless there is a statute giving such power. The court house is erected for the public use, to furnish a place to hold the courts, and for officers for the clerk, sheriff, treasurer and auditor, and for such other public purposes as may be necessary."

We think the lease referred to in your letter was void ab initio and the county court should exercise its duty to secure that part of the courthouse so occupied under the lease for the public uses for which it was intended. In the event it becomes necessary to take drastic action in order to procure possession of that part of the courthouse occupied under such lease, it will doubtless be the safer procedure to give the lessee or lessees thirty days notice to vacate such space. Such notice should be issued on an order of record made by the county court, particularly describing the space so occupied and the notice to vacate signed by the presiding judge, he to be authorized to sign same by the aforesaid order.

Honorable James E. Curry

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CONCLUSION

It is the opinion of the Attorney General:

1. (a) That it is the duty of the respective county courts of the state to furnish probate and magistrate courts the specific space in the courthouse or elsewhere for the proper transaction of their business, and to furnish such courts adequate storage installations for their books, records and files, and further to furnish such courts necessary furniture, equipment, appliances and supplies for the efficient transaction of their business with reasonable dispatch. And, further, that action of county courts may be compelled in the above respects.

(b) That business coming before probate or magistrate courts is of a public nature and should be transacted as such. A private office for a probate judge or magistrate would doubtless be proper where conditions justify it, but we do not regard the same as a necessity.

2. That county courts in this state do not have authority to lease or permit the space in the county courthouse to be used for private purposes.

Respectfully submitted,

GILBERT LAMB
Assistant Attorney General

APPROVED:

J.E. TAYLOR
Attorney General of Missouri

DIRECTOR OF REVENUE: Director of Revenue may establish branch offices for administration of motor vehicle law, employ personnel and fix compensation. Employees to be paid out of state treasury. Motor vehicle owners, etc., shall pay only lawful fees for licenses. Gifts to employees for statutory services not favored by law. Attorney General cannot represent persons for recovery of excess license charges.

February 28, 1951

Honorable W. D. Cruce
State Representative
Capitol Building
Jefferson City, Missouri

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2-28-51

Dear Sir:

Referring to your letters dated February 9 and February 10, 1951, respectively, we will take up the matters mentioned in certain paragraphs of same which appear to us to be in their logical sequence. The first paragraph of your letter dated February 10 reads:

"I have very carefully checked the statutes and I am unable to find any place where the Director of Revenue is given authority to pay deputy collectors a 7¢ fee for each license plate sold. The only statute I can find which ever gave that authority is Section 8368, Laws of Missouri, 1945, Page 1194."

By reason of comparatively recent changes in our constitution and laws that may affect a conclusion on the questions presented, our discussion will take a somewhat wider range than would ordinarily be done in answering your inquiries. In this connection it may be helpful to take a look at past legislation relating to the administration of motor vehicle laws.

1. (a) By Section 8368, R. S. Mo. 1939, the Secretary of State had power to appoint a Commissioner of Motor Vehicles, who acted under the general supervision of the Secretary of State, who was authorized to fix the compensation of the Commissioner. The section further provided:

" * * * All other employees shall be appointed by the commissioner, with the approval of the secretary of state, to serve at his pleasure and for such compensation as shall be fixed by the secretary of state: Provided,

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no employee shall receive a greater salary than is paid clerks in any other state departments for similar work: Provided, however, there shall not be expended for clerical hire to exceed twelve hundred fifty dollars (\$1,250) for each ten thousand (10,000) motor vehicles registered, and twelve hundred fifty dollars (\$1,250) for each ten thousand (10,000) certificates of ownership issued in any calendar year. Before entering upon the discharge of their duties, the commissioner and employees in charge of branch offices shall each give bonds of a surety company authorized to do business in this state, * * * " (Emphasis ours.)

And:

" * * * The commissioner and all other employees shall be allowed all necessary traveling expenses while in the discharge of their duties. * * * "

And:

" * * * The commissioner shall establish, in each municipality in this state having a population of seventy-five thousand (75,000) or more, a branch office, in charge of an employee to be known as a deputy commissioner, * * * to receive applications for registration and certificates of ownership and to deliver certificates and number plates to applicants therefor. * * * The secretary of state may establish temporary or permanent branch offices in such other localities of the state as the business may warrant. Such deputy commissioners in charge of such branches as are not paid a salary for their services as deputy commissioners shall be paid for their services a sum equal to seven cents for each set of number plates issued, which amount shall be paid by the secretary of state out of funds appropriated for that purpose. * * * " (Emphasis ours.)

Under such section, the Commissioner had specific authority to locate and establish branch offices for administration of the then Motor Vehicle Law, and supplying the personnel necessary

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therefor, with their compensation to be fixed on either a salary basis or at a sum equal to seven cents per set of plate numbers issued.

Section 8402, in part, provided that:

"All fees for the registration of motor vehicles, trailers, chauffeurs, operators, certificates of title and motorcycles provided for herein shall be collected by the secretary of state and deposited in a bank where the branch office collecting same is located. * * * "

The latter section indicates that branch offices were authorized to collect all licenses and fees due under the Motor Vehicle Law. Section 8392c required purchasers of motor vehicles or trailers to have certificates of ownership for same issued by the Commissioner upon blanks to be furnished by him. Section 8369 required owners of motor vehicles, etc., to file in the office of the Commissioner, by mail or otherwise, applications for registration and providing fees for the issuance of certificates therefor.

Laws of Missouri, 1943, p. 663, repealed Section 8369, R. S. Mo. 1939, and enacted a new section. The section as reenacted, provided that certain owners of motor vehicles or trailers should cause to be filed, by mail or otherwise, in the office of the Commissioner, applications for registration thereof on blanks to be furnished by the Commissioner.

(b) Then along came the 1945 Constitution of Missouri, effective March 30, 1945, with Section 22, Article IV thereof reading in part as follows:

"The department of revenue shall be in charge of a director of revenue, and shall have divisions of collection, budget and comptroller, and other divisions as provided by law. The division of collection shall collect all taxes, licenses and fees payable to the state, except that county and township collectors shall collect the state tax on tangible property until otherwise provided by law. * * * "

Of course, licenses and fees due on account of the ownership or operation of motor vehicles in this state are to be collected by the Department of Revenue through its subsidiary, the Division

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of Collections. Section 30, Article IV of the Constitution, in connection with such fees and licenses, in part declares:

"For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue derived from * * * license fees and taxes upon motor vehicles, trailers, * * * (excepting the sales tax on motor vehicles and trailers, * * *) less the cost, (1) of collection thereof, * * * shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other: * * * *"
(Emphasis ours.)

Thereafter the General Assembly was and is authorized to appropriate moneys out of the Highway Department Fund received from such fees and licenses for the use of the Department of Revenue to pay the cost of collecting same.

In order to have the activities of state government dovetail into the 1945 Constitution, the 63rd General Assembly, by Laws 1945, p. 1428, with an emergency clause attached, the validity of which we assume, approved by the Governor April 26, 1946, centralized certain powers in a Department of Revenue to be headed by a Director of Revenue and vesting the Director of Revenue with a considerable discretion in the exercise of his powers and duties conferred on him. This legislation is now Chapter 32, RSMo. 1949.

Section 32.030, RSMo. 1949, after requiring the Director of Revenue to take and subscribe an oath of office, provides:

" * * * He shall also deposit with the secretary of state a bond, with sureties to be approved by the governor, in the amount of five hundred thousand dollars payable to the state of Missouri, conditioned on the faithful performance of the duties of his office and the satisfactory accounting of all moneys received by him. * * * " (Emphasis ours.)

Section 32.040, after reciting that the Director of Revenue and the Department of Revenue shall be furnished with suitable quarters in the City of Jefferson, further provides:

" * * * The director of revenue shall also establish and maintain permanent branch

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offices in the cities of St. Louis and Kansas City, and shall have power to select other additional places in the state for special full time or temporary offices."
(Emphasis ours.)

The foregoing section specifically directs the Director of Revenue to establish and maintain permanent branch offices in St. Louis and Kansas City, and also invests him with discretionary authority to set up and maintain additional branch offices in the state for special full time or temporary purposes in relation to the discharge of his duties as Director of Revenue, as imposed or required by law.

Among other powers and duties of the Director of Revenue as outlined in Section 32.050, paragraph 9 provides that the Director of Revenue:

"Be empowered to employ and remove such assistants, clerks and other employees in the department of revenue and each of the divisions of the department as the work of the department and divisions thereof may require within the limits of the appropriation and to fix their compensation;"
(Emphasis ours.)

Paragraph 10 of Section 32.050 provides that the Director of Revenue shall:

"Decide questions of policy of the department of revenue and each of the divisions thereof;"

Paragraph 14 of the same section states that the Director of Revenue shall:

"Receive all appropriations to the department of revenue for the use of the department of revenue and the several divisions thereof and shall be responsible for the disbursement and expenditure thereof."

In connection with the powers of the Director of Revenue, Section 136.020 reads, in part, as follows:

"The director of revenue with the approval of the governor, shall appoint a state collector of revenue, who shall head the division of collection, and who shall be

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under the supervision and direction of
the director of revenue. * * * "

Concerning the duties of the Collector of Revenue, Section
136.030, in part, provides:

"The state collector of revenue, subject
to the approval and under the direction
of the director of revenue, shall:

* * * * *

"(2) Make provisions for the collection
of the state income tax, inheritance tax,
motor vehicle drivers' license tax,
motor vehicle registration fees, motor
vehicle fuel tax, and sales tax; * * * "

By the provisions of Section 136.050, the State Collector of
Revenue at the supervision of the Director of Revenue, is given
the following authority:

"The state collector of revenue may
assign an employee or employees of the
division of collection to discharge the
duties of the division of collection
in any department, institution or agency
of the state, and such employee or
employees shall be afforded office space
and access to the records and property of
the department, institution or agency
used in the collection of any tax, license
or fee payable to the state when approved
by the director of revenue. The head of
such department, institution or agency
shall cooperate with and afford every
necessary facility to such employee or
employees in the discharge of his or their
duties." (Emphasis ours.)

The latter section was first enacted by Laws of Missouri, 1945,
p. 1428, and reenacted by Laws of Missouri, 1947, after Sections
32.040 and 32.050 were in effect.

(c) The 63rd General Assembly by Laws of Missouri, 1945,
p. 1194, repealed certain sections of R. S. Mo. 1939, including
Section 8368, together with Section 8369, Laws of Missouri, 1943,
p. 664, and reenacted certain sections in lieu thereof with new

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sections, abolishing the office of Commissioner of Motor Vehicles and imposing in the Director of Revenue all of the powers and duties in reference to administration of the Motor Vehicle Law. The bill carried an emergency clause, the effectiveness of which we assume, approved by the Governor April 30, 1946. It will be noted that the latter legislation was approved by the Governor subsequent to the approval of the bill creating the office and defining the duties of the State Director of Revenue.

As stated, Laws of Missouri, 1945, p. 1194, repealed Section 8368, R. S. Mo. 1939, and reenacted a new Section 8368, p. 1196. Because of the seeming importance of the repealed section in connection with the questions involved here, we set it out in full.

"It shall be the duty of the Director of Revenue to carry out the provisions of this article, except to the extent that powers and duties shall otherwise by this article be conferred upon another governmental agency. The Director of Revenue may establish temporary or permanent branch offices in such localities of the state and appoint such deputies as the business may warrant; Provided, however, that at least one such deputy shall be maintained in each county in the state. Such deputies in charge of such branches as are not paid a salary for their services as deputies shall be paid for their services a sum equal to seven cents for each set of number plates issued, which amount shall be paid by the Director of Revenue out of funds appropriated for that purpose. The director of revenue may destroy all applications for registration of motor vehicles and dealers after the same shall have been on file for four (4) years, but the application for registrations of chauffeurs, registered operators and certificates of ownership shall be preserved as permanent records." (Emphasis ours.)

The latter enactment provided that the Director of Revenue had authority to set up temporary branch offices for the transaction of Motor Vehicle business in charge of deputies, and that there be maintained a deputy in a branch office in each county in the state for the purpose of administering the Motor Vehicle Law. The deputies in charge of such offices who were not paid a salary, were to be compensated on a basis of seven cents per set of number plates issued through the office.

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(d) The above Section 8368 was repealed, Laws of Missouri, 1947, Vol. I, p. 380. It is now Section 301.040, RSMo. 1949, and reads:

"The director of revenue may notify each registered motor vehicle owner by mail, at the last known address, within an appropriate period prior to the beginning of the registration period to which he has been assigned, of the date for reregistration. Such notice shall include an application blank for registration and shall specify the amount of license due and the registration period covered by such license. Application blanks shall also be furnished the county clerk of each county and all branch offices of the department of revenue where they shall be made available to any person upon request." (Emphasis ours.)

The amended section provides that the Director of Revenue may notify each registered motor vehicle owner by mail of the date when such owner is to reregister, such reregistration being required by Section 301.030, establishing a monthly series basis of registration. Such notice shall include an application blank for such reregistration and the notice shall specify the amount due for such reregistration and the period covered by the license issued on such reregistration. Such application blanks shall also be furnished all branch offices of the Department of Revenue where they shall be made available to any person upon request.

This amended section recognizes the authority of the Director of Revenue to set up branch offices and that he may equip the same with personnel for the administration of the Motor Vehicle Law. With the notice in his possession, a motor vehicle owner would receive the same service at a branch office as he would at the main office of the Director of Revenue, since Section 301.160 provides that when the application for license is approved, and the money due therefor paid, the Director of Revenue shall deliver to the owner, by mail, or through authorized agents of the Director of Revenue, the receipt of the automobile department for such money and a set of license plates to be attached to the owner's motor vehicle.

In repealing Section 8368, 1945 Laws, the legislature eliminated the provision that a branch office for the administration of the Motor Vehicle Law be maintained in every county in the state, and abandoned the word "deputies." It also abolished the statutory

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command that, where a salary was not paid, the compensation of the deputy in charge of such branch office should be measured on the basis of the volume of business transacted through such branch office.

We also know that at the date of such repeal there was left unimpaired the provisions of Section 32.040, directing and authorizing the Director of Revenue to establish branch offices in the state and equip them with supplies and postage, for the administration of the affairs of the various divisions under his supervision, including the Division of Collections, which included the licenses and fees payable to the state on account of the Motor Vehicle Law, and Sections 301.040 and 301.160 recognizing the authority of such Director to establish such branch offices for the purpose of serving persons, firms and corporations, required to comply with the Motor Vehicle Law.

Upon such repeal, there was in full force and effect Section 32.050 empowering the Director of Revenue to employ such persons as are necessary to carry on the business of the divisions under his control and to fix the compensation for such employees, within the limits of the money appropriated by the legislature therefor. Section 301.050 does not state what yardstick the director shall use in determining the amount of such salaries.

Necessarily the business transacted through the respective branch offices would vary in amount and volume, so that it might be more equitable to fix the compensation of the employees in charge of the branch offices on a basis of the amount or volume of business transacted through the office rather than on a fixed flat monthly salary. Under the present law we think the Director of Revenue has authority to exercise his sound discretion in that respect, but in either event the compensation of the employee is to be paid out of the State Highway Department Fund.

Perhaps as a legislative construction or recognition of the right of the Director of Revenue to establish branch offices for the administration of the Motor Vehicle Law, and his right to supply same with personnel, the 65th General Assembly, Laws of Missouri, 1949, p. 10, Section 24, and p. 30, Section 3.040, appropriated money charged to the State Highway Department Fund for such purposes.

Section 301.190 provides for the issuance of certificates of ownership of motor vehicles before owners are entitled to registration, for which the Director of Revenue is to be paid a fee of \$1.00. Applications for certificates of title are to be made on blank forms furnished by the Director of Revenue and apparently may be filled out and signed anywhere.

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In order to register a motor vehicle not theretofore registered, Section 301.020 requires the owner to file, by mail or otherwise, in the office of the Director of Revenue, an application for registration on a blank to be furnished by the Director. In this connection, it is to be noted that Section 8369, R. S. Mo. 1939, in reference to registration of owners of motor vehicles, required the owner to "cause to be filed, by mail or otherwise, in the office of the Commissioner, an application for registration or blank to be furnished by the Commissioner for that purpose." So, as to details of making an application, the procedure under the latter section was substantially the same as it is under Section 301.020. We think the applicant could make out and sign the application wherever he desires.

The amount of fees for an original or reregistration of a motor vehicle is regulated by Sections 301.050 to 301.100 inclusive, the amount of the registration fees being based on the volume of horsepower of the engine of the particular motor vehicle to be registered.

Section 301.210 provides that upon the sale of a motor vehicle a new certificate of ownership therefor will be issued by the Director of Revenue for a fee of \$1.00. When a certificate of ownership, registration certificate, number plate or badge is lost, mutilated or destroyed, under Section 301.300 the Director of Revenue will issue a duplicate thereof upon the payment of a fee of \$1.00. Section 302.040 requires applicants to pay the Director of Revenue a fee of twenty-five cents for the issuance of a driver's license.

Section 301.050 requires all registration fees due under the Motor Vehicle Law be paid to the Director of Revenue and shall accompany the application for registration. The latter section should be read in connection with Section 301.040, requiring application for registration blanks to be furnished branch offices where the same may be procured upon request by motor vehicle owners. Section 301.090 requires that all fees for registration of motor vehicles, trailers, etc., issuance of certificates of title, be collected and deposited by the Director of Revenue with the State Treasurer to the credit of the State Highway Department Fund. The two latter sections are in compliance with the 1945 constitutional provisions heretofore set out.

We think the legislature, in enacting the present Motor Vehicle Law, intended there should be a proper, efficient and prompt administration of same, considering the obviously large volume of business in connection with same over the entire state of Missouri.

Honorable W. D. Cruce

From all of the foregoing, it is clear to us that the General Assembly intended to grant, and did grant, the Director of Revenue authority to establish branch offices with equipment and supplies furnished them, for the additional administration of the Motor Vehicle Law in all respects and details.

If and when the legislature appropriates money therefor, we think the Director of Revenue has the power to employ persons for the performance of the duties required by such branch offices and to fix the compensation of such employees on a fair and equitable basis, such compensation to be paid out of the State Treasury and within the limits of the appropriation above mentioned.

2. (a) The first sentence of the third paragraph of your letter dated February 10, 1951, reads:

"I am unable to find any place in the statutes which authorizes the payment of a 5¢ fee on drivers' licenses."

We assume you mean by the quoted statement that you have been informed that employees of the Director of Revenue in charge of administration of the Motor Vehicle Law have charged applicants for driver's licenses five cents in addition to the statutory charge of twenty-five cents therefor.

Section 302.050, RSMo. 1949, in part, provides:

"To all applicants, submitting a satisfactory application under the requirements set forth in sections 302.010 to 302.270, the director of revenue shall issue a motor vehicle driver's license upon the payment of a fee of twenty-five cents therefor, for two years. * * * " (Emphasis ours.)

In reference to applications for driver's licenses and the contents of same, Section 302.040 provides:

"1. Applications for a motor vehicle driver's license shall be made upon a form approved and furnished by the director of revenue. * * * The application shall be verified by the applicant before a person authorized to administer oaths, and officers and employees of the department are hereby authorized to administer such oaths without charge. * * * " (Emphasis ours.)

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Section 302.030 is as follows:

"All fees collected by the director of revenue under the terms of sections 302.010 to 302.270 shall be deposited as provided in section 301.090, RSMo. 1949."

Section 301.090 mentioned in the last quoted section has been heretofore referred to.

The Director of Revenue is entitled to be paid twenty-five cents for the issuance of a driver's license, and the collection of any additional amount for the issuance of such license by the Director of Revenue is an unlawful exaction. Should the applicant sign the required affidavit before some officer other than an employee of the Director of Revenue, then the applicant would be required to pay such officer the statutory charge for taking such oath. In the latter case, the applicant would be required to pay the necessary carrying charges for transmitting the application through the United States mail to the office of the Director of Revenue at Jefferson City, Missouri.

(b) Your letter dated February 9, 1951, reads as follows:

"It has come to my attention that there is a wide-spread practice in Missouri of added charges being made by deputies of the Department of Revenue in various branch offices when citizens purchase their automobile licenses from them.

"I would like your official opinion as to the legality of this practice. I would appreciate it if it could be rendered as soon as possible because if such a practice is legal I would like to introduce legislation prohibiting it."

We interpret your quoted letter as meaning that you have information that certain employees of the Director of Revenue in charge of the administration of the Motor Vehicle Law have charged applicants for motor vehicle licenses sums in addition to the statutory charge due the state for the issuance of such licenses.

If we have correctly interpreted the meaning of your letter, it is a short road to the answer. It is a rule of law in this state, old as the hills, that a public officer is entitled to compensation for his official services only when he can put his

Honorable W. D. Cruce

finger on a statute authorizing its payment.

The statutes, as we have pointed out, set out the specific amount, or a mode of its ascertainment, due the state when the owners of motor vehicles are complying with the Motor Vehicle Law. When such owners make such statutory payments they have discharged their full obligation to the state and every person in it. The employees of the Director of Revenue must look to him and him alone for their compensation, regardless of the sufficiency of the amount. In this connection we call attention to State ex rel. Buder v. Hackmann, 265 S. W. 532, 305 Mo. 342, the Supreme Court of this state saying, 1.c. Mo. 351:

"The argument of hardship and that an officer should not be compelled to incur a financial loss, in performing the duties incident to his office, cannot be considered by the courts in passing upon the rights of relator as fixed by the statute. Failure to provide a salary or fee for a duty imposed upon an officer by law does not excuse his performance of such duty. (State ex rel. v. Brown, 146 Mo. 1.c. 406.)
* * * But such fact is for consideration by the Legislature, and not by the courts."

The case of Yuma County v. Wisener, 46 P. 2d 115, 99 A.L.R. 642, involved facts somewhat similar to the matters under consideration. In the latter case the clerk of the superior court of Yuma County, Arizona, was authorized to issue marriage licenses. When non-residents were granted licenses they were charged a sum in addition to the statutory fee upon representation of the clerk that the additional amount was properly due under the law. The case involved the validity of such additional exactions by the clerk. At A.L.R. 646, the Supreme Court of Arizona, discussing the legality of the clerk's action, said:

"Any officer who gives a citizen to understand in any manner that the law requires a fee for the performance of a duty in excess of the legal one, and who retains such excess, when paid, for his own use, is certainly guilty of the most reprehensible conduct, which comes perilously near to being a criminal offense, if it is not actually such."

Any money collected from a motor vehicle owner in this state by an employee of the State Director of Revenue in addition to

Honorable W. D. Cruce

the statutory fees and license charges, under the circumstances as we have interpreted your letter, is unwarranted in law and "comes perilously near to being a criminal offense, if it is not actually such."

(c) In defining what is meant by public policy, the Supreme Court of the United States in *Trist v. Child*, 88 S. Ct. 441, 450, said:

"The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. The theory of our government is, that all public stations are trusts, and that, those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments."

Situations such as you mention in your letter may be sought to be excused on the theory that additional sums received were gifts from motor vehicle owners. Even that practice is unethical and violative of public policy. The opulent, and those less fortunately circumstanced, are entitled to equal public service under the law, uninfluenced by gratuities or other favors.

(d) There is no doubt that an employee collecting and retaining such illegal exactions is liable for its return at the suit of the owner of the motor vehicle or applicant for driver's license. The Attorney General of this state does not have authority, in his official capacity, to institute or maintain such an action.

Honorable W. D. Cruce

The Supreme Court of this state decided that question in State ex rel. v. Chicago and Alton Railroad Company, 265 Mo. 646, where the Attorney General of Missouri, properly representing the state as a claimant, sought also to recover for individuals, firms and corporations, sums demanded by and paid the railway company on account of freight charges in excess of the lawful rates therefor. The right of the Attorney General to sue for claimants, other than the State of Missouri, was questioned and on that point the court said:

"We realize that there is an equitable rule which permits persons similarly situated to sue in the name of a class, but that rule has no application to a thousand individual claims independent upon different proof. The rule is largely dissipated by our code which requires all cases (legal or equitable) to be brought by the party interested."

In the present situation the state is not a claimant. The statutes and the common law specify or indicate the character of actions the Attorney General may institute, and do not include suits for money due individuals on account of moneys illegally collected from them by a public officer, and in which moneys the general public does not have a pecuniary interest.

CONCLUSION

Upon a consideration of this whole matter as we have outlined and detailed it, it is the opinion of the Attorney General of Missouri:

(a) That the General Assembly has empowered the Director of Revenue to establish, maintain and furnish the supplies and personnel for branch offices in this state for the supplementary administration of the Motor Vehicle Law in all of its details.

(b) That the Director of Revenue is given authority by the legislature, if and when the General Assembly has appropriated funds for that purpose, to employ persons to administer the Motor Vehicle Law and, in the exercise of a sound discretion, he may fix the compensation of such employees therefor, upon a basis or measured by a standard just and equitable to the state and employee, but within the limits of such appropriation.

That compensation payable to such employees for their services in administering the Motor Vehicle Law is to be paid only

Honorable W. D. Cruce

out of the treasury of the State of Missouri.

(c) That any money collected by an employee of the Director of Revenue from the owner of a motor vehicle, trailer, etc., or applicant for driver's license, in excess of the amount required by the statutes of Missouri to be paid by any of them as a compliance with the provisions of the Motor Vehicle Law, is unlawful.

(d) That the employee making such unlawful collection is liable for the return of such money, and suit may be instituted and maintained therefor by the owner of a motor vehicle or trailer, or applicant for driver's license, having paid same.

Respectfully submitted,

GILBERT LAMB
Assistant Attorney General

APPROVED BY:

J. E. TAYLOR
Attorney General of Missouri

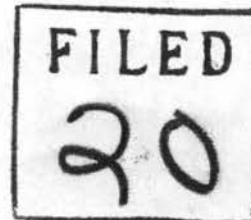
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COURTS: Jurisdiction of probate court to entertain
INSANE PERSONS: insanity inquiry under Section 458.020,
RSMo. 1949, depends on residence in the
county of the alleged insane person and
not his mere presence there.

March 6, 1951

3/6/51

Mr. Ray J. Cunningham
Chief Attorney, Regional Office
Veterans Administration
415 Pine Street
St. Louis 2, Missouri



Dear Mr. Cunningham:

The following opinion is rendered in reply to your
recent inquiry reading in part as follows:

"* * *The purpose of this letter is
to request an opinion from your office
as to the interpretation to be placed
upon Section 447 Missouri Revised Statutes
1939, as to the meaning of the words "in
its county"; also whether these words
may, in the exercise of the jurisdiction
of the Probate Court, be interpreted to
mean in any county, or wherever found,
or is restricted to the county of the
residence of the person sought to be
committed.* * *"

Section 447, R. S. Missouri, 1939, referred to in
your inquiry is now found at Section 458.020, RSMo 1949,
and provides as follows:

"If information in writing, verified by
the informant on his best information
and belief be given to the probate court
that any person in its county is an
idiot, lunatic or person of unsound
mind, and incapable of managing his
affairs, and praying that an inquiry
thereinto be had, the court, if satis-
fied there is good cause for the exercise
of its jurisdiction, shall cause the facts

Mr. Ray J. Cunningham

to be inquired into by a jury; provided, that if neither the party giving the information in writing, nor the party whose sanity is being inquired into call for or demand a jury, then the facts may be inquired into by the court sitting as a jury."

In the case of Baker v. Smith, 226 Mo. App. 510, 18 S.W. (2d) 147, decided in 1929, the Kansas City Court of Appeals reviewed at length prior decisions of the appellate courts of Missouri touching the matter of jurisdiction required under Section 458.020, RSMo. 1949, cited above. The court spoke as follows in 226 Mo. App. 510, l.c. 523:

"* * * We find nothing in the decisions of Missouri which justifies the conclusion that a probate court may inquire into the question of sanity or insanity upon a bare showing that the defendant is actually present in the county. The showing must go farther. Some good reason must be shown why that particular court should exercise its jurisdiction. * * * We believe that the words 'in its county' as used in section 444, mean 'resident in its county', except in exceptional circumstances, which require a different construction upon the grounds of public policy. * * *"


CONCLUSION

It is the opinion of this department that Section 458.020, RSMo. 1949, does not confer jurisdiction on a probate court to entertain an insanity inquiry affecting a person who is merely present in the county and who is an actual resident of some other county.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

CRIMINAL PROCEDURE:
CERTIFICATION AND RETURN OF
FEE BILLS BY MAGISTRATE IN
CERTAIN MISDEMEANOR CASES:

Under Section 550.240, RSMo 1949,
trial magistrate in every mis-
demeanor case where county liable
for costs, must make out complete
fee bill and return same and all
papers in case to circuit or
criminal court clerk of county
as promptly as circumstances permit.

APRIL 24, 1951

4-25-51

Honorable Hugh D. Davis
Judge of the Magistrate Court
Howard County
Fayette, Missouri



Dear Sir:

This is to acknowledge receipt of your recent request for
a legal opinion of this department, which request reads as follows:

"Please explain Section 555.240, Page 3994,
in the Missouri Revised Statutes, 1949, as
to when the State or County is liable for
costs in a misdemeanor before Magistrates.

"Does this mean in each case that all papers
in the file, i.e.: Information, Warrants and
Sheriff's Returns, Bonds, etc., together with
the Fee Bill for Costs in the case?

"Is this always filed with the Circuit Clerk.
If it must be, when is it done? The Magistrate
Court has no regular term. Must this be done
at the close of each month or at the end of the
year?"

First, we would like to call your attention to an error in
the printing of the 1949 Statutes. Section 555.240 at page 3994,
should read Section 550.240. Fee bill from magistrate's court. -
and we will refer to the correct section number in the course of
our opinion.

The specific inquiries contained in your letter might be
summarized in the following questions:

1. When the state or county has become liable for the payment
of court costs incurred in the trial of a misdemeanor case before

Honorable Hugh D. Davis

a magistrate court, and it becomes the duty of the magistrate (under provisions of Section 550.240, RSMo 1949) to certify a fee bill of such costs to the clerk of the circuit court of the county; in making such certification, is the magistrate required to include the information, warrants and sheriff's returns, bonds, and all other papers and docket entries which have been filed in such case?

2. (a) Is this (the fee bill and papers attached) always filed with the circuit clerk?
- (b) When is it done?
- (c) Since the magistrate court has no regular term, when must the fee bill and all attached papers be certified to the circuit clerk? At the close of each month or at the end of the year?

Section 550.240, RSMo 1949, reads as follows:

"Whenever the state or county shall be liable under the provisions of this chapter, or any other law, for costs incurred in any examination of any felony, or in the trial of any misdemeanor before any magistrate, it shall be the duty of such magistrate to make out, certify and return to the clerk of the circuit or criminal court of the county a complete fee bill, specifying each item of service and the fee therefor, together with all the papers and docket entries in the case; and it shall thereupon be the duty of such clerk to make out a proper fee bill of such costs, which shall be properly and legally chargeable against the state or county, which shall be examined by the prosecuting attorney, and proceeded with in all respects as a fee bill made out for costs incurred in such court of record."

Assuming that the county has become liable for the payment of court costs which have accrued in the trial of a misdemeanor case before a magistrate court, as provided by Section 550.240, supra, it then becomes the duty of the magistrate before whom the proceedings were had to make out a complete fee bill of the costs in the case, specifying each item of service and the fee charged therefor. The fee bill, together with "all the papers and docket entries in the case," shall be certified to by the magistrate and returned to the clerk of the circuit or criminal court of the county.

Honorable Hugh D. Davis

While the word "all" is usually one of simple meaning and of relatively small importance, yet because it is mentioned in the above quoted statute, and for the further reason that reference is made to it in your letter as to what its actual meaning might be in the statute, we find it necessary to define this seemingly simple word.

According to Webster's New International Dictionary, the word "all" means the whole number or sum of. "All" has been given the meaning of every one, or the whole number of particulars. Words and Phrases, Vol. 3, page 134.

Another definition is "all means the entire thing, everything included or concerned, the aggregate, the whole, totality * * *". Words and Phrases, Vol. 3, page 135.

Section 1.090 of Chapter 1, RSMo 1949, relating to the construction of statutes, particularly with reference to the construction of words and phrases used therein reads as follows:

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

Applying these definitions and the statutory rule of construction noticed above, in order to determine or explain the meaning of Section 550.240, supra, as requested, and particularly that portion of the section in which the word "all" appears, it is our thought that the literal interpretation of this section is that in those instances in which the magistrate is required to make out a complete fee bill of costs in a misdemeanor case and where the county is liable for the costs, the magistrate shall certify to the correctness of the fee bill and shall return it, together with every paper of any description and every docket entry that has been filed or made in the case, to the clerk of the circuit or criminal court of the county.

Our answer to your first inquiry is in the affirmative, and it is our thought that the magistrate must return the information, warrants and sheriff's returns, bonds and every other paper that has ever been filed in the case together with the fee bill.

Your second inquiry really consists of three questions instead of one, and which for convenience we have above designated as 2.(a), (b) and (c), and which we shall endeavor to discuss separately, in the order given.

Honorable Hugh D. Davis

Question 2.(a) reads as follows:

"Is this always (meaning fee bill and attached papers) filed with the circuit clerk?"

The meaning of your second question is not clear to us and we are in doubt as to the nature of the exact meaning intended, and the exact nature of the answer expected.

Upon first thought inquiry seems to be made as to whether the fee bill and attached papers are to be certified and returned to the circuit clerk in every misdemeanor case in which the county is liable for the costs.

Again it appears that the inquiry might be interpreted to be whether the fee bill and papers are to be certified and returned to the circuit or criminal court clerk, or whether they might legally be certified and returned to some other officer than the one referred to in the statute.

We interpret the above quoted section to mean that it is the duty of the trial magistrate in every misdemeanor case in which the county is liable for the costs to certify the fee bill and to return it and papers attached to the circuit or criminal court clerk of the county.

If we have correctly interpreted your second inquiry, our answer is that the magistrate must perform his duties with reference to the fee bill in every misdemeanor case tried in his court, where the county is liable for the costs.

With reference to the implication which may have been intended, to be given to your second question as to whether the fee bill and papers might be filed with some other officer than the circuit clerk, we call attention again to the above quoted statutory provisions. The statute specifically provides to what officer the magistrate is required to make return and it is his duty to strictly comply with this section of the statute and to file the fee bill and attached papers with the clerk of the circuit or criminal court of his county, as the case may be. He has no legal authority to make the return to any other officer than the one named in the statute.

The answer to your second inquiry, if it was intended to have been framed in the manner suggested in the preceding paragraph, is that the magistrate, in certifying a fee bill of a misdemeanor case in which the county is liable for the costs has no authority to return the fee bill and attached papers to any other officer than to the clerk of the circuit or criminal court clerk of his county.

Honorable Hugh D. Davis

We understand your last question to inquire as to what period, or length of time has been allowed a magistrate in making out, certifying and returning the fee bill to the circuit clerk of the county.

In answer to your question we cannot state that the magistrate has been limited to any certain period of time in certifying and returning a fee bill in a case of this kind, since no statutes prescribe any period of time for the performance of the magistrates duties in this respect. However, if we cannot state that a certain period of time is allowed the magistrate in performing his duties, we can definitely state the time when he may begin the performance of such duties.

As we interpret the meaning of Section 550.240, supra, it appears that whenever, or as soon as the liability of the county for costs in a misdemeanor case before a magistrate has become fixed, and as soon after the trial of such case as the magistrate can obtain and assemble all the necessary information to enable him to make out the complete fee bill required by this section, he is authorized to do this, to certify and return same with attached papers in the case at the earliest possible date.

It is our thought that a reasonable length of time is afforded the magistrate in the preparation, certification and return of fee bills under this section. As to what period might or might not be considered a reasonable length of time for the performance of such duties, no hard and fast rule can be laid down, since the circumstances of each case will determine the amount of time to be spent in performing such duties. However, it appears that the intention of the legislature in the enactment of this section must have been that only sufficient time as is necessary for the magistrate to make out a complete fee bill, certify and return the same to the circuit clerk is to be consumed by the magistrate in the performance of these duties.

In answer to your last question, we are of the opinion that the duties of the magistrate mentioned above should be done as promptly as time and the circumstances of each case will permit.

As stated above, the magistrate is authorized to make out, certify and return the fee bill (although not required to do so by statute) as soon after the trial of the case as the information is available, and we believe this is the better practice to follow in all cases of this kind. By so doing the magistrate would greatly facilitate the performance of his duties, and might serve the public in a greater way, without added expense or trouble to himself, and particularly to those of the public to whom witness, or

Honorable Hugh D. Davis

other fees are due, but who cannot be paid until some future date, and not then, until the magistrate in whose court the fees were earned, has returned the fee bill to the circuit clerk and the clerk has followed the subsequent procedure required by law. No one to whom fees are due in a case of this kind should ever be forced to wait for the payment of his fees because of the failure of the magistrate to perform his duties in returning a fee bill to the circuit clerk, as promptly as he should. It is our further thought that the magistrate should return all fee bills to the clerk of the circuit or criminal court of his county just as promptly after the trial of the case as it is possible for him to do.


CONCLUSION

It is therefore the opinion of this department that in the trial of every misdemeanor case before a magistrate court in which the county is liable for the payment of the costs under the provisions of Section 550.240, RSMo 1949, it shall be the duty of the magistrate as soon after the trial of the case as time and the circumstances will permit, to make out, certify and return a complete fee bill of the costs of the case, together with all papers and docket entries in the case to the clerk of the circuit or criminal court of the county. The statute provides that such fee bill and attached papers are to be filed with the circuit or criminal court clerk, and the magistrate may not make the return to any other officer.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

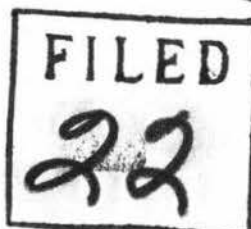

J. E. TAYLOR
Attorney General

PNC:hr

RECORDER OF DEEDS: When a chattel mortgage on a motor vehicle is recorded, the recorder of deeds should certify the fact on the certificate of title.

February 26, 1951

3-1-51



Mr. Anthony J. Denny
Recorder of Deeds
City of St. Louis
St. Louis, Missouri

Dear Sir:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"I request an opinion upon the following question:

"Section 443.480, R. S. Mo. 1949, relates to the filing of chattel mortgages on motor vehicles. Such section provides that the recorder of deeds, upon request of the mortgagee, shall certify on the certificate of title to the mortgaged motor vehicle that the chattel mortgage has been filed, showing the date, the amount of the mortgage and the name of the payee.

"My question is: If the chattel mortgage is recorded instead of filed, should the recorder of deeds certify on the certificate of title that the chattel mortgage has been recorded."

This question may be resolved by construction of Sections 443.460 and 443.480, RSMo. 1949. Section 443.460 is as follows:

"No mortgage or deed of trust of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee

Mr. Anthony J. Denny

or cestui que trust, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded, or unless the mortgage or deed of trust, or a true copy thereof, shall be filed in the office of the recorder of deeds of the county where the mortgagor or grantor executing the same resides, and in the case of the city of St. Louis, with the recorder of deeds for said city, or, where such grantor is a nonresident of the state, then in the office of the recorder of deeds of the county or city where the property mortgaged was situated at the time of executing such mortgage or deed of trust; and such recorder shall endorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons; and such mortgage or deed of trust, or copy thereof, may be so filed, although not acknowledged, and shall be as valid as though the instrument were fully spread upon the records of the county, or, in the case of the city of St. Louis, upon the records of said city, in the office of the recorder of deeds; and such instrument, when acknowledged and recorded, or when the same, or a copy thereof, shall have been filed, as above provided, shall thenceforth be notice of the contents thereof to all the world."

This statute provides two ways in which a chattel mortgage or deed of trust may be lodged for record in the office of the recorder of deeds. The instrument may be recorded and returned to its owner; or the instrument itself, or a true copy thereof, may be deposited and kept in the files of the office. The mortgagee or trustee may employ either of these two methods. In either case the effect is the same.

Section 43.480, RSMo. 1949, is as follows:

"It shall be the duty of the recorder of deeds on request of the mortgagee, or his assignee,

Mr. Anthony J. Denny

to certify on the certificate of title to the mortgaged motor vehicle, that such chattel mortgage has been filed showing the date, the amount of the mortgage and the name of the payee. When such chattel mortgage is released it shall be the duty of the recorder to so show on the certificate of title. In all counties now or hereafter having a population of three hundred thousand inhabitants or less the recorder shall receive for services herein provided a fee of twenty cents; in all counties now or hereafter having a population of three hundred thousand inhabitants or more the recorder shall receive for services herein provided a fee of thirty cents. A mortgage on a motor vehicle shall not be notice to the whole world, unless the record thereof is noted on the certificate of title to the mortgaged motor vehicle, as herein provided; provided, however, that the provisions of this section shall not apply to chattel mortgages given to secure the purchase price or any part thereof or to a motor vehicle sold by the manufacturer or their distributing dealers, or to a chattel mortgage given by dealers to secure loans on the floor plan stock of motor vehicles."

Under this law the recorder of deeds, when requested, must certify and make certain entries on the certificate of title to a mortgaged motor vehicle when such chattel mortgage has been "filed" in his office. The term "filed" is used here in a broad sense. It means that the instrument is lodged in the office either to be recorded in the books or to be kept in the files. It was not the intention of the legislature to make one plan more effective than the other. The law clearly makes it the duty of the recorder to render the same service in either case, regardless of whichever means the mortgagee may choose to employ.

Mr. Anthony J. Denny


CONCLUSION

It is the opinion of this department that when a chattel mortgage on a motor vehicle is recorded, the recorder of deeds is under duty to certify the fact on the certificate of title, in the same manner as if the instrument had been filed for deposit in the files of his office.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

BAT:ba

CIRCUIT CLERKS:
DEPUTIES:
THIRD CLASS COUNTIES:

(a) County Courts should continue to pay the salary of the duly elected, acting, and qualified circuit clerk, while clerk is in army; (b) County courts cannot deduct from the salary paid to a deputy circuit clerk; (c) County courts cannot deduct from the salary of the circuit clerk an increase in salary for a deputy, which increase was ordered by the circuit judge.

August 14, 1951

Filed: #22

Honorable Robert A. Dempster
Prosecuting Attorney of Scott County
Sikeston, Missouri



Dear Sir:

Your recent request for an official opinion has been assigned to me to answer. You thus state your opinion request:

"At the request of the County Court, I desire to submit to you herewith a statement of facts for your opinion concerning the questions raised herein.

"At the last election Lloyd G. Briggs was elected Circuit Clerk. Shortly after taking office, he was drafted and he is now in the army, under selective service. By reason of his absence, an additional deputy clerk was employed by the County Court and the additional salary set up in the County budget in February was \$150.00 per month. Briggs draws his full salary under the statute. He spends no time in the office and makes no contributions to the salary of either deputy. The office has such a volume of work that it requires two full time workers. Recently the Circuit Judge directed the County Court to raise the salary of one of the Deputy Clerks, an additional \$21.00 per month which would exceed the amount set up the budget by that sum.

"Several questions present themselves. (1) Shall the County Court continue to pay the duly elected, acting, and qualified Circuit Clerk since he is now in the army and performs none of the functions of the office?

Honorable Robert A. Dempster

(2) If the Circuit Clerk is entitled to the salary of the office, can the County Court deduct therefrom the salary to be paid an additional deputy caused by his absence from the office? (3) Can the County Court deduct from the Circuit Clerk's salary the amount ordered to be paid in excess of the budget to pay the additional deputy clerk? In other words, the \$21.00 ordered to be paid, is in excess of the amount requested, approved, and fixed in the County budget for deputy clerk hire, so can that sum be deducted from the Circuit Clerk's salary?

"In view of the fact that the salaries are being held up pending your opinion, your earliest consideration of this matter would be greatly appreciated."

We will consider the questions which you ask, in the order in which you asked them.

1. It is well settled in Missouri law that a public officer does not forfeit his office by reason of being drafted into military service. In the case of *State ex inf. McKittrick, Attorney General, vs. Wilson* 166 S.W. 2d 499, the situation was that one Wall had been elected circuit clerk of Henry County, Missouri, and had entered upon the duties of his office. Subsequently, he was drafted into military service. Some time later, the Governor of Missouri appointed one Wilson to the office of circuit clerk of Henry County "to fill the vacancy in the office." The Attorney General then filed a quo warranto proceeding to determine the right of Wilson to hold this office. In the above styled case, the Missouri Supreme Court entered a judgment of ouster against Wilson. In the course of its opinion, the Court stated, l.c. 500, 501:

"The question for decision is whether Wall's induction into the army under the Selective Service Act resulting in his inability personally to perform the duties of his office caused him automatically to forfeit his office.

"It is our judgment that Wall did not forfeit his office by being drafted into the military service of his country. This would be equally true if he had volunteered for the duration, particularly in view of our universal military service."

Honorable Robert A. Dempster

In the above case the Court held only that Wall did not forfeit his office by reason of being inducted into military service. The Court said nothing in regard to whether he should be paid his salary. However, there is a line of Missouri cases which hold that the holder of a public office is entitled to the compensation attached to such office. In the case of *Coleman v. Kansas City, Mo.*, 173 S.W. 2d 572, 1.c. 577, the Court said, in part:

"It may be that his holding the position as State Administrator of the W. P. A. was grounds for his removal (a question we do not decide), yet the fact remains that he did continue to hold the office of Director of Public Works and discharged all duties as such in a manner satisfactory to the appellant, and, of course, all his official acts during that time were legal. *State ex rel. City of Jefferson v. Hackman*, 287 Mo. 156, 229 S.W. 1082.

"During the time Murray held the office, he is entitled to the salary fixed by law as an incident to that office. 'Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the amount or value of services performed, but is incidental to the office.' *State ex rel. Evans v. Gordon*, 245 Mo. 12, loc. cit. 27, 149 S.W. 638, loc. cit. 741. Also, see *State ex rel. Chapman v. Walbridge*, 153 Mo. 194, 54 S.W. 447. *State ex rel. Vail v. Clark*, 52 Mo. 508."

Hence, the answer to your first question is that the county court of Scott County should continue to pay the duly elected, acting and qualified circuit clerk of Scott County, the regular amount of compensation which goes with that office.

2. Your second question is: "If the circuit clerk is entitled to the salary of the office, can the County Court deduct therefrom the salary to be paid an additional deputy caused by his absence from the office?"

The circuit clerk would not be liable for the salary of such deputy in view of Section 483.350, RSMo 1949, which states:

Honorable Robert A. Dempster

"All annual salaries provided in sections 483.330 to 483.345, shall be paid out of the county treasury in monthly installments at the end of each month by warrant drawn by the county court upon the county treasury."

The status of the deputy circuit clerk would be the same as if the circuit clerk were in the office. Hence, the answer to your second question is that the county court cannot deduct the salary of the second deputy from the salary of the circuit clerk.

3. Your third question is: "Can the county court deduct from the circuit clerk's salary the amount ordered to be paid in excess of the budget to pay the additional deputy clerk? In other words, the \$21.00 ordered to be paid, is in excess of the amount requested, approved and fixed in the county budget for deputy clerk hire, so can that sum be deducted from the circuit clerk's salary?"

We do not feel that it is necessary, in order to answer your question, to go into the matter of whether the circuit judge had the power to increase the salary of the deputy, in excess of the amount fixed in the county budget. We do believe, in the light of Sections 483.345 and 483.350, both quoted above, this sum of \$21.00 per month could not be deducted from the salary of the circuit clerk.

CONCLUSION

It is the opinion of this department that: (a) The county court of Scott County should continue to pay the salary of the duly elected, acting, and qualified circuit clerk; (b) The county court of Scott County cannot deduct from the salary of the circuit clerk the salary paid to a deputy circuit clerk; and (c) The county court of Scott County cannot deduct from the salary of the circuit clerk an increase in salary for a deputy which increase was ordered by the circuit judge.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HPW:ab

MAGISTRATE COURT JURORS:

A clerk of a magistrate court is required by law to issue a scrip to a magistrate court juror for his services. The county treasurer is required to pay such scrip out of any money in the treasury appropriated for county expenses as in the case of payment of county war-rants.



December 4, 1951

12-4-51

Honorable W. A. Despain
Judge of the Probate and Magistrate Court
Shannon County
Eminence, Missouri

Dear Judge Despain:

This will be the opinion you requested from this Department in reply to your question whether the clerk of a magistrate court may legally draw jury scrips against the county treasurer for payment of jurors in magistrate courts. Your letter requesting an opinion on the subject reads as follows:

"I would like an opinion of your office as to the payment of Jurors in the Magistrate Court, where Jurors are drawn as provided under Chapter 499, Sections 499.010 and 499.020 and 499.120.

"Question: Can the Clerk of the Magistrate Court draw Jury Scripts against County Treasurer? (legally so) for the payment of Jurors:

"I take the position that the Clerk of the Magistrate Court is a State Officer, (by appointment) and since all Magistrate Clerk fees are paid over to the State Treasurer, that the Magistrate Clerk has no authority, to draw a script against the County, neither has the County Treasurer any authority to honor said script.

"I take the position that the Juror should claim his attendance before the Magistrate Clerk, then that attendance claim should be transferred to the Clerk of the Circuit Court, and the Clerk of the Circuit Court issue the script, please advise."

Honorable W. A. Despain

Your letter indicates that you believe the clerk of the magistrate court has no authority to draw a scrip against the county treasurer in favor of a magistrate juror, and, that the county treasurer has no authority to honor such scrip.

Section 499.120, RSMo 1949, which you mentioned in your letter, reads as follows:

"Upon the demand of such juror, the clerk shall give him a scrip, verified by his official signature, showing the amount which such juror is entitled to receive out of the county treasury."

Section 499.130, RSMo 1949, respecting the honoring of such scrip by the county treasurer and the payment of the magistrate court juror upon the presentation of such scrip by the juror to the county treasurer reads as follows:

"The treasurer of the county is hereby required, upon the presentation to him of any scrips given by the clerk aforesaid, to pay the same out of any money in the treasury appropriated for county expenses, in the same manner and subject to the same rules as county warrants; and said scrip shall be received by the sheriff, collector or other proper officer in the payment of any debt due the county."

It will be noted that said Section 499.130, requires the county treasurer to pay such magistrate jury scrip in the same manner and subject to the same rules as county warrants. Chapter 50, RSMo 1949, under the subject of "County Finances and Budget" provides in Sections 50.120, 50.220 and 50.230 for the presentation and method of payment of county warrants. These sections are quite too lengthy to quote here, but we note such sections, since the method of paying county warrants is made the pattern for the payment of magistrate jury scrips under said Section 499.130, RSMo 1949. We respectfully refer the reader to the county warrants sections numbered above.

These sections providing for the payment of jurors in magistrate courts are direct and positive. There is no

Honorable W. A. Despain

alternative, exception, or other method or plan for the payment of such jurors provided in any other section of Chapter 499, RSMo 1949, dealing with the payment of jurors in magistrate courts. We believe the required performance of such duties as are imposed upon the clerk of the magistrate courts to give jurors serving in magistrate courts the scrip required by the statute and the duty of honoring and paying such scrip when presented by the juror to him, or her, by the county treasurer in the method and manner provided for the payment of county warrants is the expression of the public policy of this State respecting the payment of magistrate court jurors. It is, therefore, we believe, mandatory. Such officers have no discretion in the matter, but must perform such duties in obedience to the statute.

CONCLUSION.

It is, therefore, considering the above-numbered sections of our statutes, the opinion of this Department that:

1) A clerk of a magistrate court under Section 499.120, RSMo 1949, shall give a magistrate court juror a scrip, verified by the juror's official signature showing the amount which such juror is entitled to receive out of the county treasury as his compensation for jury service in such court.

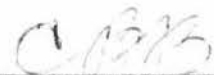
2) That by the terms of Section 499.130, RSMo 1949, upon presentation of such scrip by such juror to the county treasurer, the county treasurer is required to pay the same out of any money in the county treasury appropriated for county expenses, in the same manner and subject to the same rules as county warrants.

3) That the terms of both of said last-numbered sections are mandatory, and such officers have no authority to disregard the terms of said statutes, but must perform such duties in obedience thereto.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY
Assistant Attorney General


J. E. TAYLOR
Attorney General

GWC:tr

OFFICERS:
COURTS:
MAGISTRATES:
NOTARIES PUBLIC:

Probate judge and magistrate may also hold office of notary public, but is not entitled to receive compensation for any duties performed as notary public. Change in population of county changes salary of county officers effective January 1, 1951.

January 10, 1951

Honorable William Lee Dodd
Prosecuting Attorney
Ripley County
Doniphan, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department, which reads as follows:

"Does the law permit a Probate Judge and Magistrate, who is also a Notary Public, to perform the duties of a Notary Public?

"Does a decrease in population, 1950, change the salary of a sheriff before the end of his term? In this county, 4th class, the population has fallen below the present salary rate for the sheriff. Will this affect the salary of the present sheriff?"

In considering your first question we should first like to call attention to certain statutes relating to notaries public. Section 13360, R.S. Mo. 1939, in part, provides:

"The governor shall appoint and commission in each county and incorporated city in this state, as occasion may require, a notary public or notaries public, who may perform all the duties of such office in the county for which such notary is appointed and in adjoining counties. Each such notary shall hold office for four years, but no person shall be appointed who has not attained the age of twenty-one years, and who is not a citizen of the United States and of this state.
* * *

Honorable William Lee Dodd

Section 13361, R.S. Mo. 1939, relating to the powers and duties of notaries public, provides as follows:

"They may administer oaths and affirmations in all matters incident or belonging to the exercise of their notarial offices. They may receive the proof or acknowledgment of all instruments of writing relating to commerce and navigation, take and certify relinquishments of dower and conveyances of real estate of married women; the proof or acknowledgment of deeds, conveyances, powers of attorney and other instruments of writing, in like cases and in the same manner and with like effect as clerks of courts of record or authorized by law; take and certify depositions and affidavits and administer oaths and affirmations, and take and perpetuate the testimony of witnesses in like cases and in like manner as justices of the peace are authorized by law; make declarations and protests, and certify the truth thereof under their official seal, concerning all matters by them done by virtue of their offices, and shall have all the power and perform all the duties of register of boatmen."

Section 13362, R.S. Mo. 1939, provides for the keeping of certain records relating to the official acts of notaries public.

Section 13363, R.S. Mo. 1939, requires that every notary public shall provide a notarial seal, with the inscription thereon as provided by the statute.

Section 13364, Laws of Missouri, 1945, page 1316, requires that every notary public, before entering upon the discharge of the duties of his office, shall take an oath of office and shall give bond as set forth in the statute.

We find nothing in the Constitution or in the statutes of the State of Missouri which specifically prohibits a probate judge or magistrate performing the duties of a notary public. Nor do we see that any of the duties which may be performed by a notary public would in any way conflict with the powers and duties to be exercised by a probate judge or magistrate that would render the two offices incompatible and thus prevent one person holding both offices and performing the duties in respect to each.

Honorable William Lee Dodd

As a matter of fact, notaries public are empowered to perform certain duties with like effect as clerks of courts of record are authorized to do, and they are authorized to perform other duties in like manner as justices of the peace are authorized by law to do, and said statute would now have reference to magistrates rather than justices of the peace. Thus it would appear that the two offices could function harmoniously.

However, we do call your attention to Article V, Section 24 of the Constitution of Missouri, 1945, which, in part, provides:

" * * * No judge or magistrate shall receive any other or additional compensation for any public service, * * *"

It will be observed that by the foregoing statutes a notary public is given territorial jurisdiction in which he may perform his duties, his office is fixed with a definite term, specific qualifications are provided for said office which a person desiring to be appointed must meet, he must take an oath of office before discharging any of the duties of his office, he must give bond, he must keep certain records, he must provide a notarial seal, and even his powers and duties are provided by statute. It would therefore seem it was intended that the creation of the office of notary public was for a public purpose, and that a person holding said office and in performing the duties thereof would be rendering a public service to those people within his territorial jurisdiction.

Consequently, we believe that a probate judge or magistrate in performing the duties of the office of notary public would be rendering a "public service" within the meaning of Article V, Section 24 of the Constitution, supra, and while a probate judge or magistrate might be permitted to perform the duties of the office of notary public he would not be entitled to receive compensation therefor.

✓ In connection with your second question we might first say that the courts have held that the salary or compensation of a public officer is subject to being altered by a change in population. As a matter of fact, it has been so held in cases wherein the population has increased resulting in an increase in compensation for the official, it being ruled that said increase arising out of a change in population did not violate a constitutional provision prohibiting an increase in compensation during the term of office of a public officer.

Honorable William Lee Dodd

Regarding the situation where the salary is increased by a change in population, the Supreme Court of Missouri, in the case of State ex rel. Harvey v. Linville, 300 S.W. 1066, said at l.c. 1067:

"The increase of salary which a statute permits after an election showing an increase of population is not in violation of the Constitution, in that the salary is increased during the term for which the officer was elected, because the law in force at the time of his election fixes his salary, to be ascertained at periods as changed by the increase in population. State ex rel. v. Hamilton, 303 Mo. 302, 260 S.W. 466."

We further believe that under the law a decrease in population would also operate to decrease the salary of an official which was established by law and determined on population.

Further in regard to this question, we are enclosing a copy of an opinion rendered to Honorable Walter A. Eggers, Probate Judge of Perry County, under date of March 31, 1950, which we believe supplies the information you desire.

In other words, under this opinion the change in salary of the sheriff would become effective as of January 1, 1951.

CONCLUSION


It is therefore the opinion of this department that the office of probate judge or magistrate is not incompatible with the office of notary public and that one person would be permitted to hold both offices and perform the duties of each. However, it is our further opinion that a probate judge or magistrate performing the duties of a notary public would be performing a public service within the meaning of Article V, Section 24 of the Constitution of Missouri, 1945, and would not be entitled to receive any other or additional compensation therefor.

It is further the opinion of this department that the salary of a sheriff is subject to change due to a change in population and that said change in salary would become effective as of January 1, 1951.

Respectfully submitted,

APPROVED:

RICHARD F. THOMPSON
Assistant Attorney General


J. E. TAYLOR
Attorney General

Enc.

SURFACE WATER:

*Roads and
Bridges.*

A landowner may, by the erection of a dam or embankment, keep surface water off of his land, provided he exercises reasonable care and prudence in accomplishing that object.

April 2, 1951

4/2/51

Honorable J. Morgan Donelson
Prosecuting Attorney of Mercer County
Princeton, Missouri

FILED

24

Dear Sir:

Your recent request for an official opinion has been assigned to me to answer. You thus state your opinion request:

"I would like to know just what authority a county court or township board would have to remedy the following situation:

"A public road has been established for a number of years. Surface water flows down from upper owners of the adjoining land. The water flows to the road and passes through culverts in the road. Normally this water would flow off the right-of-way and continue its flow on the adjoining land, but the adjoining landholder has constructed levies or dikes on his property to prevent the water from flowing upon his land. The water, as a result, is forced back into the ditches of the road causing it to become soggy, etc. It would cause considerable expense to build a ditch on the right of way sufficient to remedy this situation. There are several places where the ditch would have to be from four to seven feet deep.

"Does such a landholder have the right to dam against this surface water to the damage of the public road?"

In the above you have given a very clear picture of this situation. You did not specifically say so, but we assume from your letter and a common knowledge of the

Honorable J. Morgan Donelson

construction of roads, that surface water comes down into a ditch of some depth on the side of the road, thence it flows along the ditch parallel to the road until it reaches a culvert through which it flows under the road to the opposite side, where it is balked in its course by an artificial obstruction erected by the owner of the adjacent land, and is therefore held upon the road.

We will observe, first, that the water which issues from the culverts mentioned in your letter of inquiry, is "surface water." In the case of *Keyton v. Missouri-Kansas-Texas R.R.*, 224 S.W. 2d 616, 1.c. 622, the Court stated, in part:

"The term 'surface water' refers to that form or class of water derived from falling rain or melting snow or which rises to the surface in springs and is diffused over the surface of the ground while it remains in that state or condition and has not entered a natural water course. If overflow or flood waters becomes severed from the main current of a natural water course or leaves the same and spreads out over the lower ground (as it did in this case) it becomes and is a part of the surface water. 56 Am. Juris. Secs. 65 and 90. *Schalk v. Inter-River Drainage District*, Mo. App., 226 S.W. 277; *Jones v. Chicago B. & Q. R. Co.*, 343 Mo. 1104, 125 S.W. 2d 5; *Sigler v. Inter-River Drainage District*, 311 Mo. 175, 279 S.W. 50; *Harris v. St. Louis-San Francisco R. Co.*, 224 Mo. App. 455, 27 S.W. 2d 1072; *Tackett v. Linnenbrink*, Mo. App., 112 S.W. 2d 160; *Morey v. Feltz*, 187 Mo. App. 650, 173 S.W. 82."

Having determined that the water in question, at the time it leaves the culverts, is "surface water," let us next see what, if any, protection a landowner upon whose land "surface water" is about to flow, may legally take to protect his land against such flow.

In the case of *Casanover v. Villanova Realty Co.*, 209 S.W. 2d, 556, 1.c. 558, 559, the Court stated, in part:

"1-3) The general topography of the two tracts of land is not in dispute and defendant's land lies higher than the plaintiffs'. The defendant could, of course, use its property in any lawful manner and for any lawful purpose, and it had the right, absent legal restrictions to the contrary, to alter the grade. It has done that and in skinning this hillside of grass, vegetation, and topsoil it has left a barren clay slope which no longer absorbs the rain that falls but lets it flow freely toward the plaintiffs' land below. This in itself does not impose any liability upon the defendant for its land is higher and is the dominant estate as to surface drainage and the plaintiffs' land being lower is the servient estate and the natural recipient of the flowing surface water. The common-law doctrine treats such water as a 'common enemy', and permits a landowner to protect his own property by whatever means he sees fit, even though he throws the water upon the land of another. Missouri has followed this doctrine with a limitation which provides that the owner of the higher land cannot collect the surface water and then cast it upon the servient estate. Our Supreme Court stated in *Keener v. Sharp*, 341 Mo. 1192, 111 S.W. 2d 118, loc. cit. 120: "The law seems to be well settled in Missouri that surface water is a common enemy which every man may ward off his land and thus throw it on an adjacent or lower owner, provided he does not, in warding it off, unnecessarily collect it and discharge it to the damage of his neighbor." Many other cases so hold. *Geisert v. Chicago R. I. & P. Ry. Co.*, 226 Mo. App. 121, 42 S.W. 2d 954; *Place et al. v. Union Township et al.*, Mo. App., 66 S.W. 2d 584; *Vollrath v. Wabash R. Co.*, D.C., 65 F. Supp. 766; *White v. Wabash R. Co.*, Mo. App., 207 S.W. 2d 505.

"(4-5) There is no contention here that the defendant collected the surface water in any fashion, and since it had the right

Honorable J. Morgan Donelson

to alter and change the surface of its property in any way it saw fit it cannot be charged with negligence in doing that which the law permitted it to do. Much of the damage done to plaintiffs' land was occasioned by the mud and silt left by the water, but this came upon their property as part of the surface water. This state has held that overflow water is surface water and it is common knowledge that it is laden with silt and the off-scourings of land. Goll v. Chicago & Alton R. Co., 271 Mo. 655, 197 S.W. 244; Place et al. v. Union Township et al., Mo. App., 66 S.W. 2d 584; Keener v. Sharp, 341 Mo. 1192, 111 S.W. 2d 118."

In the case of Keener v. Sharp, 111 S.W. 2d 118, 1.c. 120, the Court stated, in part:

"The law seems to be well settled in Missouri that surface water is a common enemy which every man may ward off his land and thus throw it on an adjacent or lower owner, provided he does not, in warding it off, unnecessarily collect it and discharge it to the damage of his neighbor. * * *"

In the case of White v. Wabash R. Co., 207 S.W. 2d 505, 1.c. 508, 509, the Court stated, in part:

"* * * In defining the 'common law doctrine' the court quotes with approval from many prior decisions. We quote what seems to be the clearest and most concise statement of that doctrine, found 83 Mo. 271, at page 283, 53 Am. Rep. 581: 'But in the case of surface water, which is regarded as a common enemy, he is at liberty to guard against it or divert it from his premises, provided he exercises reasonable care and prudence in accomplishing that object. In the language of this court in a recent case, where this subject was carefully considered, the owner of the dominant or superior heritage must improve and use his own lands in a reasonable way, and in so doing he may

Honorable J. Morgan Donelson

turn the course of, and protect his own land from, the surface water flowing thereon, and he will not be liable for any incidental injury occasioned to others by the changed course in which the water may naturally flow and for its increase upon the land of others. Each proprietor, in such case, is left to protect his own lands against the common enemy of all.' (*Italics supplied.*)

"(2) A multitude of cases, decided by the Courts of Appeals and by the Supreme Court since that time, have reaffirmed the application of the 'common law doctrine' with varying degrees of limitations and refinements. The latest definition we have been able to find is given by the Supreme Court in *Keener v. Sharp*, 341 Mo. 1192, 111 S.W. 2d 118, at page 120, where the court said: 'The law seems to be well settled in Missouri that surface water is a common enemy which every man may ward off his land and thus throw it on an adjacent or lower owner, provided he does not, in warding it off, unnecessarily collect it and discharge it to the damage of his neighbor.' (Citing many Missouri cases.) See, also, *Goll v. Chicago & A. Railroad, Co.*, 271 Mo. 655, 666, 197 S.W. 244. We have no hesitancy in saying that the 'common law doctrine' is to be applied and followed in Missouri in determining the rights of property owners in fighting surface water. The 'civil law doctrine' has been repudiated in this state."

Numerous other cases of like character could be cited, but we deem it unnecessary to do so.

From the above cited cases it is our opinion that a landowner may protect his land from surface water by raising the surface of his land, by means of dikes and embankments, to keep the surface water off of his land.

Honorable J. Morgan Donelson


CONCLUSION

A landowner may, by the erection of a dam or embankment, keep surface water off of his land, provided he exercises reasonable care and prudence in accomplishing that object.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

HPWab

MUNICIPAL CORPORATION: Agreement governing a general deposit of
HOUSING AUTHORITY: funds between a bank and housing authority
is not invalidated because one of the
commissioners is also an officer of the
bank.

April 16, 1951

St. Louis Housing Authority
Honorable James M. Douglas, Counsel
705 Olive Street
St. Louis 1, Missouri



Dear Judge Douglas:

This will acknowledge receipt of your request for an
official opinion which reads:

"On behalf of the St. Louis Housing
Authority, a municipal corporation created
under the provisions of Chapter 99, R. S.
1949, I respectfully request your opinion
on the following question:

"Does Section 99.060 render invalid an
agreement governing a general deposit of
funds between a bank and a Housing Auth-
ority, organized under Chapter 99, R. S.
1949, relating to Municipal Housing,
because one of the commissioners of the
Housing Authority is also an officer of
the bank?"

You specifically inquire if Section 99.060, RSMo 1949,
renders invalid an agreement governing a general deposit of
funds between a bank and a Housing Authority organized under
Chapter 99, RSMo 1949, for the reason that one of the com-
missioners of the Housing Authority is also an officer of the
bank.

Chapter 99, supra, was enacted by the Legislature to
stimulate the building of housing for those persons with low
incomes and contemplates the clearance of slum areas and also
the construction of dwellings and apartments by a Housing
Authority managed by five commissioners appointed by the
mayor, which commissioners receive no compensation, but are
allowed necessary expenses including traveling expenses
incurred in the performance of their official duties.

Honorable James M. Douglas

It will be necessary for us to examine and construe Section 99.060, RSMo 1949, in order to answer your request. Said section reads in part:

"No commissioner or employee of an authority shall acquire any interest direct or indirect in any housing project or in any property included or planned to be included in any project, nor shall he have any interest direct or indirect in any contract or proposed contract for materials or services to be furnished or used in connection with any housing project. * * "

The prohibition contained in the foregoing provision is limited to contracts only for "materials or services" and does not apply to all kinds of contracts. Therefore, if the general depositary agreement between a bank and the Housing Authority does not constitute a contract for materials or services to be used in connection with a housing project, then Section 99.060, supra, does not apply and our answer to your request must be in the negative.

"Materials" has been defined in 57 C.J.S., page 448, as follows:

"As usually employed in law, the word 'material' signifies things furnished to a workman or artisan to be used in his work, and it is commonly used to designate any article employed in the erection and completion of buildings * * * * *."

See also Terteling Bros. v. Glander, 85 N.E. (2d) 379, 383, 151 Ohio State 236.

"Services" has usually been understood to refer to work or labor. Webster's New International Dictionary, 2d Edition, defines "services" in the following manner:

"2. Performance of labor for the benefit of another * * * * * .

and

"4. The deed of one who serves, labor performed for another * * * * * ."

Also in law "services" is defined in 57 C.J., Section 3, page 278, as follows:

Honorable James M. Douglas

"The plural, 'services' is often used as having the same meaning as the singular 'service'; and it has been held to mean labor; work done by one person at the request of another, regardless of whether its nature be of a high or humble grade; although it has been said that in the plural the term involves more than mere labor, and signifies much more than merely the act of performing labor, and may include, as well, expenditures, materials, and things furnished."

In view of the foregoing definitions of materials and services, it is clear that an agreement covering a general deposit of funds is not a contract for materials or services as contemplated under Section 99.060 and Chapter 99, RSMo 1949. It is also clear that the services to be furnished in connection with any housing project under Chapter 99, supra, means work or labor used in the project.

"Housing project" is defined for purposes of Chapter 99, supra, in Section 99.020, subsection (12) as follows:

"'Housing project' shall mean any work or undertaking to demolish, clear or remove buildings from any slum area; such work or undertaking may embrace the adaptation of such area to public purposes, including parks or other recreation or community purposes; or to provide decent, safe and sanitary urban or rural dwellings, apartments or other living accommodations for persons of low income; such work or undertaking may include buildings, land, equipment, facilities and other real or personal property for necessary, convenient or desirable appurtenances, streets, sewers, water service, site preparation, gardening, administrative, community, health, welfare or other purposes; or to accomplish a combination of the foregoing. The term 'housing project' also may be applied to the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, reconstruction, alteration and repair of the improvements and all other work in connection therewith;"

Honorable James M. Douglas

"Bank" has been defined under Section 362.010, subsection (3), RSMo 1949, when used in that particular chapter, as follows:

"'Bank' means any corporation soliciting, receiving or accepting money, or its equivalent, on deposit as a business, whether such deposit is made subject to check, or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing;"

Further definitions of "banks" will be found in 7 Am. Jur., Section 2, page 24:

"Strictly speaking, the term 'bank' implies a place for the deposit of money. In its more enlarged sense, a bank may be defined as an institution, generally incorporated, authorized to receive deposits of money; to lend money and issue promissory notes, usually known by the name of 'bank notes'; or to perform some one or more of these functions."

In Section 4, at page 25, we find:

"The usual attributes of the banking business are receiving deposits, * * *."

The legal relation between a general depositor and a bank is that of debtor and creditor. The relation is not that of master and servant, principal and agent, employer and employee, or vendor and vendee.

In Section 444, Am. Jur., at page 313, it is stated:

"It is a fundamental rule of banking law that in the case of a general deposit of money in a bank, the moment the money is deposited it becomes the property of the bank, and the bank and the depositor assume the legal relation of debtor and creditor."

It is the settled law of Missouri that the relation between a bank and its depositor is that of debtor and creditor.

Honorable James M. Douglas

One of the primary rules of the construction of statutes is to ascertain and give effect to legislative intent. See State ex inf. Rice ex rel. Allman v. Hawk, 228 S.W. (2d) 785; also Meyering v. Miller, 51 S.W. (2d) 65, 330 Mo. 885. Another well established rule of statutory construction is that where the language of a statute is plain and admits by one meaning there is no room for construction. See Cummings v. Kansas City Public Service Co., 66 S.W. (2d) 920, 334 Mo. 672.

In view of the foregoing decisions defining various terms as used in the particular section under consideration and rules of statutory construction referred to, we are of the opinion that said section is not ambiguous, that such an agreement for a general deposit of funds by said Housing Authority in a bank where one member of said Housing Authority is also an officer of said bank is not invalidated for that reason.

CONCLUSION

It is therefore the opinion of this department that the bank is not furnishing any services which enter into a housing project by receiving a deposit of funds. The bank merely accepts the money furnished to it by the Housing Authority, uses it for the bank's business, and agrees to pay back a like amount when the Housing Authority demands it. The depositary agreement with the bank is clearly not a contract for materials or services to be used in a housing project. Therefore, Section 99.060, supra, does not render invalid a general depositary agreement between a bank and a Housing Authority where one of the commissioners of the Authority is also an officer of the bank.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH:VLM

COUNTY COURTS:

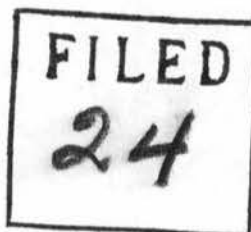
POWER TO BORROW MONEY
AGAINST FISCAL YEAR'S
TAXES AND REVENUES:

(County Courts of Class Two counties may borrow
(against fiscal year's taxes and revenues; have
(the discretion to advertise for bids concerning
(proposed borrowings; Section 50.060, RSMo 1949,
(is only statute allowing such borrowings;
(Section 50.660, RSMo 1949, has no connection
(with or bearing upon Section 50.060, supra.

4-26-51

April 25, 1951

Honorable John E. Downs
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri



Dear Sir:

We have before us your letter of February 10, 1951,
which has been assigned to the writer for an opinion.
It contains three separate questions and the pertinent
part is as follows:

"Will you please advise this office
as to whether or not -

"1. Section 50.060 of the Revised
Statutes of 1949 is the only section
pertaining to the borrowing of money
by Class 2 Counties?

* * * * *

"3. Does Section 50.660 of Revised
Statutes of 1949 relative to rules
governing contracts have any bearing
on this problem in the opinion of
your office?

"4. If Section 50.660 has no bearing
on this problem, would it be unlawful
for the County Court to advertise for
bids, when borrowing money, under
Section 50.060?"

Honorable John E. Downs

First, let us take up Section 50.060, Revised Statutes of Missouri, 1949, which reads as follows:

"The county court of counties of classes one and two may borrow money in anticipation of the collection of taxes and revenues for the current fiscal year. The amount of such loans shall at no time exceed ninety per cent of the estimated collectible taxes and revenues for the year yet uncollected. The county court shall determine the amount and terms of such loans, and shall execute and issue warrants of the county for all money so borrowed to the lenders thereof as evidence of such loans and of the terms of the county's obligation to repay the same; and immediately before their delivery to such lenders such warrants shall be registered in the office of the clerk of the county court, and upon delivery shall also be registered in the office of the county treasurer by entry upon the books provided pursuant to section 50.220, correctly stating the date, amount, serial number, in whose favor drawn, by whom presented and the date presented to the treasurer for registration, and such warrants so issued and registered in connection with such loans shall have preference and priority in payment, from the date of their registration by the treasurer over all warrants subsequently issued, and over all prior issued and then unregistered warrants."

This section, under Chapter 50, carries the heading, "County Finances and Budget," and under the subhead, "Current Indebtedness." We are convinced from going into this matter that this is the only statute allowing class two counties to borrow money in anticipation of the collection of taxes and revenues for the current fiscal year. It sets the percentage of the anticipated taxes and revenues as yet

Honorable John E. Downs

uncollected that such loans shall not exceed. It states that the county court shall determine the amount and terms of such loans, that it shall execute and issue warrants for all money so borrowed, to the lenders, as evidence of the county's indebtedness and the terms of its obligations to repay. It further sets out that, before delivery to the lenders, such warrants shall be first registered with the county clerk. Upon delivery these warrants shall be registered with the county treasurer, who enters them in accordance with procedure set out in said statute, and that they shall have preference over all warrants issued subsequent to the date of their registration with the treasurer and over all warrants prior issued and then unregistered.

Our search does not reveal any other statute allowing class two counties to borrow money against anticipated taxes and revenues for the current fiscal year.

Secondly, let us take up your second question asking if Section 50.660, RSMo 1949, has any bearing on Section 50.060, supra. We do not think this section has any bearing on the action authorized to be taken by the county court under Section 50.060. Although Section 50.660 also comes under Chapter 50, RSMo 1949, it comes under the subhead, "County Budget Laws," and it itself has to do with contracts made under the budget and appropriations made to the various county departments. Under these facts we think it has no application to Section 50.060, supra.

In answer to your third question, Section 50.060, supra, does not specifically require the county court to advertise for bids when borrowing money under this section. The statute provides that "the county court shall determine the amount and terms of such loans." This authorization gives to the county court the discretion as to the method of making the loans. As said in 67 C.J.S. 403:

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"However, when an official duty is imposed by statute and no specific method is prescribed for performing it, the officer must nevertheless comply with the statutory requirement, if it is reasonably possible to do so, and may adopt any mode reasonably suitable to carry the duty imposed into effect."

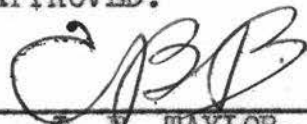
CONCLUSION

It is, therefore, the opinion of this department that Section 50.060, RSMo 1949, is the only section of the Missouri Revised Statutes that applies to and allows counties of the second class to borrow money against anticipated taxes and revenues for the current fiscal year; that Section 50.660, RSMo 1949, has no connection with or bearing upon Section 50.060, supra; that in counties of the second class the county court can lawfully advertise for bids under the terms of Section 50.060, supra, although this requirement is not set out therein.

Respectfully submitted,

A. BERTRAM ELAM,
Assistant Attorney General.

APPROVED:


J. M. TAYLOR,
Attorney General.

COUNTY BUDGET:
COUNTY AUDIT:
COUNTY COURT:

County Court of Buchanan County not authorized to order county audit if cost for same is not included in County Budget and no emergency exists necessitating the audit to be ordered.

May 3, 1951

5-7-51



Honorable John E. Downs,
Prosecuting Attorney
Buchanan County,
St. Joseph, Missouri.

Attention: Gordon Shaffer, Jr.,
Assistant.

Dear Sir:

This will acknowledge receipt of your request that this office render an official opinion to you on the following question:

"I have been requested by the County Court of Buchanan County to submit to your office the following question for an official opinion. Can the County Court, pursuant to Section 55.180 of the Revised Statutes of Missouri of 1949, call an audit if they have not provided for the expense of such audit pursuant to the budget law--specifically Section 50.570 of the Revised Statutes of Missouri of 1949, wherein it sets forth that each department, office, institution, commission, or court of the county receiving its revenues in whole or in part from the county, shall prepare and submit to the Budget Officer, estimates of its expenditures for the next budget year.

"The County Court did not, in setting up its budget, provide for the expense of an audit for the year 1951. Since this expenditure has not been provided for, it would seem that under our budget law, the only source for the payment of the expense of an audit would be from the Emergency Fund as provided in Section 50.570 of the Revised Statutes of Missouri of 1949. This section states that transfers from said fund shall be made only for unforeseen emergencies. No emergency exists in Buchanan County which necessitates the calling of an audit, although the Court desires to call one at this time. The last audit in Buchanan County was conducted during the year 1947, and the County Court deems it advisable and desirable to have one at this time."

Section 55.180 RSMo. 1949, relating to second class counties, provides the accounts of the county may be audited every odd numbered year and you will particularly note that it is within the discretion

Honorable John E. Downs.

of the county court to determine whether an audit is necessary or desirable and said court may have such audit made every two years. Said section reads as follows:

"The accounts of the county may be audited, if the county court shall determine such an audit desirable or necessary, every odd numbered year within six months after the termination of the preceding fiscal year, either by a certified public accountant to be employed by the county court or by the state auditor, as said court may determine. If such audit is to be made by the state auditor, the state auditor shall be requested by the county court to make such audit, as provided by law. The audit herein provided shall also review the records of the receipts and disbursements and the property inventory of every officer or office of the county which receives or disburses money on behalf of the county or which holds property belonging to the county. Upon the completion of the investigation, the certified public accountant or the state auditor, as the case may be, shall render a report to the county court at the close of said period, together with a statement showing under appropriate classifications, the receipts and disbursements of the county during said period. The first audit, as provided by this section, may be made following the fiscal year of 1946, and such audit may be made every two years thereafter. The county court shall provide for the expense of such audit, which in no event shall exceed the sum of five thousand dollars, if made by a certified public accountant employed by the county court."

Section 50.570 RSMo. 1949 requires each agency receiving its revenues from the county to submit estimates of its requirements for expenditures in the following terms:

"On or before December first of each year, each department, office, institution, commission, or court of the county receiving its revenues in whole or in part from the county shall prepare and submit to the budget officer estimates of its requirements for expenditures and its estimated revenues for the next budget year compared with the corresponding figures for the last completed fiscal year and estimated figures for the current fiscal year. The expenditure estimates shall be classified to set forth the data by funds, organization units, character and objects of expenditure; the organization units may be subclassified by functions and activities, if so directed by the budget officer. The estimates shall be accompanied by work programs showing the work it is planned to do and the estimated cost thereof classified according to funds, organization units, character

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and objects of expenditures. The estimates of revenues shall be prepared by the accounting officer and shall be classified so as to show the receipts by funds, organization units, and sources. The budget officer may direct that estimate forms be prepared and sent to such departments, offices, institutions, commissions and courts by the accounting officer and that the estimates shall be returned to the accounting officer for tabulation. If any department, office, institution, commission or court shall fail to return its estimates by December first, the budget officer shall make the estimates and such estimates shall be considered as the estimates of such department, office, institution, commission, or court.

"The budget officer shall review the estimates, altering, revising, increasing or decreasing the items as he shall deem necessary in view of the needs of the various spending agencies and the probable income for the year. He may direct any officer to appeal and explain his estimates or to present additional information. The budget officer shall then prepare the budget document in the form prescribed in the following section, and shall transmit it to the county court not later than December fifteenth. The budget officer shall have power to recommend and the county court shall have power to fix all salaries of employees, other than those of elective officers, except that no salary for any position shall be fixed at a rate above that fixed by law for such position. The budget officer shall provide in his recommendations, and the county court shall provide in its appropriation order, that an amount equal to not less than three per cent of the total estimated general fund revenues shall be appropriated each year as an emergency fund. At any time during the year the county court may, on recommendation of the budget officer, make transfers from the emergency fund to any other appropriation; provided, that such transfers shall be made only for unforeseen emergencies and only on unanimous vote of the county court.

"The budget officer shall hold public hearings before preparation of the budget document or before submission to the county court. All estimates, work programs, and other budget information shall be open to public inspection at any time."

Section 50.580, providing the annual budget shall present a complete financial plan, reads as follows:

Honorable John E. Downs.

"The annual budget of any such county shall present a complete financial plan for the ensuing budget year. It shall set forth all proposed expenditures for the administration, operation and maintenance of all offices, departments, commissions, courts and institutions; the actual or estimated operating deficits of surpluses from prior years; all interest and debt redemption charges during the year and expenditures for capital projects. In addition, the budget shall set forth in detail the anticipated income and other means of financing the proposed expenditures. All receipts of the county for operation and maintenance shall be credited to the general fund, and all expenditures for such purposes shall be charged to such fund; provided, that receipts from the special tax levy for roads and bridges shall be kept in a special fund and expenditures for roads and bridges may be charged to such fund. All receipts from the sale of bonds for any purpose shall be credited to the bond fund created for the purpose, and all expenditures for such purpose shall be charged to such fund. All receipts for the retirement of any bond issue shall be credited to a retirement fund for such issue, and all payments to retire such issue shall be charged to such fund. All receipts for interest on outstanding bonds and all premiums and accrued interest on bonds sold shall be credited to the interest fund, and all payments of interest on such bonds shall be charged to such interest fund. The county court may create such other funds as may be necessary from time to time."

Section 50.630 authorizes the transfer of any unencumbered appropriation balance within the same fund and transfers from the emergency fund as follows:

"The county court shall have power to authorize the transfer within the same fund of any unencumbered appropriation balance or any portion thereof from one spending agency under its jurisdiction to another; provided, that such action shall be taken only on the recommendation of the budget officer and only during the last two months of the fiscal year, except that transfers from the emergency fund may be made at any time in the manner herein provided."

The Missouri Supreme Court has held in *Gill v. Buchanan County*, 341 Mo. 727, 108 S.W. 2d. 340, 342, that "the purpose of the County Budget Law was 'to compel * * * county courts to comply with the constitutional provision (now Art. VI Section 26 (a)) by providing ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.'"

Honorable John E. Downs.

While the State Supreme Court held in the case of Gill v. Buchanan County (cited supra) that salaries of county officials which are fixed by the State Legislature are to be paid whether they are included within the county budget or not this was based upon the following reasoning by the court:

"Defendant also contends that plaintiff is not entitled to recover because there was not a sufficient amount provided in the 1934 county budget for county court salaries to pay salaries of \$4,500 each. (Only \$840 more than the total of salaries figured at \$3,000 each was included in the salary fund for the county court. However, as hereinabove noted, salaries of county judges are fixed by the Legislature and the Constitution prevents even the Legislature from changing them during the terms for which they were elected. Surely, the county court cannot change them, by either inadvertently or intentionally providing greater or less amounts in the salary fund in the budget. The action of the Legislature in fixing salaries of county officers is in effect a direction to the county court to include the necessary amounts in the budget. Such statutes are not in conflict with the County Budget Law but must be read and considered with it in construing it. They amount to a mandate to the County Court to budget such amounts. Surely no mere failure to recognize in the budget this annual obligation of the county to pay such salaries could set aside this legislative mandate and prevent the creation of this obligation imposed by proper authority. Certainly such obligation imposed by the Legislature were intended to have priority over other items as to which the county court had discretion to determine whether or not obligations concerning them should be incurred. They must be considered to be in the budget every year because the Legislature has put them in and only the Legislature can take them out or take out any part of these amounts. This court has held that the purpose of the County Budget Law was 'to compel * * * county courts to comply with the constitutional provision, section 12, art. 10' by providing 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.' Traub v. Buchanan County, 341 Mo. 727, 108 S.W. 2d. 340, 342.

Honorable John E. Downs.

"To properly accomplish that purpose, mandatory obligations imposed by the Legislature and other essential charges should be first budgeted, and then any balance may be appropriated for other purposes as to which there is discretionary power. Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey, cannot bar the right to be paid the balance. Instead, it must be the discretionary obligations incurred for other purposes which are invalid, rather than the mandatory obligation imposed by the same authority which imposed the budget requirements. We, therefore, hold that a county court's failure to budget the proper amounts necessary to pay in full all county officers' salaries fixed by the Legislature, does not affect the county's obligation to pay them."

Unlike the payment of salaries which are fixed by mandate of the State Legislature and are by operation of law under this case included in the county budget, the audit of the county accounts is left within the discretion of the county court. The said court is not required to have an audit made but may in their discretion order an audit.

From the dictum in this case we infer that the cost of an audit would need to be included in the county budget or it could not be ordered by the county court and paid for from county funds. However, section 50.630 quoted supra authorizing the transfer of any unencumbered appropriation balance within the same fund or transfers from the emergency fund may make possible the payment of the costs of an audit ordered by the county court. You indicate in your letter, however, that this statute would not now be applicable because no emergency exists warranting an audit to be ordered by the court.


CONCLUSION.

The County Court of Buchanan County is not authorized to order the payment of the cost of an audit of the county accounts if the same has not been included in the County Budget and no emergency exists which necessitates the ordering of an audit which could be ordered paid from the emergency fund as provided in section 50.570, RSMo. 19491.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

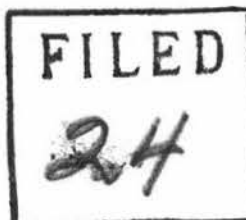
JEM/ld

PLUMBERS: A person may be prosecuted for violation of a state law regulating plumbing even though he has obtained a permit to perform specific plumbing work under provisions of a city ordinance, if he violates such state law.

May 29, 1951

6/2/51

Honorable John E. Downs
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri



Dear Sir:

Your recent request for an official opinion has been assigned to me to answer. You thus state your opinion request:

"Chapter 10, Article XV, Section 10-432 of the Municipal Code of the City of St. Joseph, Missouri provides as follows:

"APPLICATION FOR PERMIT. 'Application for a permit under this code shall be made on blanks furnished by the city, in writing, by the person, master plumber or journeyman plumber having in charge the work to be done, showing the number and kind of fixtures to be done, showing the number and kind of fixtures to be installed, or openings left in sewer, soil, waste or vent pipes for fixtures, together with a copy of specifications of work to be done; also, the correct street and house number, the name of the owner of the premises and signed by the person, master plumber of journeyman plumber, accompanied by a receipt from the city treasurer for the amount of fees, hereinafter provided for.'

"Sections 341.010 through Section 341.080 contain certain provisions including a penalty for the violation of such sections.

"Members of the Plumbers Union have reason to believe that certain persons who are neither master plumbers or journeymen plumbers, have, after having been granted

Honorable John E. Downs

a permit under Section 10-342, done plumbing work. It is our further understanding that these persons are relying on that section as a defense, if charged with a misdemeanor as provided for in Section 341.080.

"In my opinion, Section 10-342 does not provide insulation from prosecution under Chapter 341 R. S. Mo. Would you please be so kind as to give me the benefit of your views on this matter."

We infer, from your letter, that your question is: If a person violates Sections 341.010 through 341.070, RSMo 1949, can he be prosecuted under Section 341.080, RSMo 1949, even though he holds the permit provided for in Chapter 10, Article 15, Section 10-342 of the Municipal Code of St. Joseph, Missouri?

Section 341.010, RSMo 1949, reads:

"That any person now or hereafter engaging or working at the business of plumbing in cities or towns of fifteen thousand or more inhabitants in this state, either as master plumber or journeyman plumber, shall first receive a certificate thereof in accordance with the provisions of sections 341.010 to 341.080."

Section 341.080, RSMo 1949, reads:

"Any person violating any provisions of sections 341.010 to 341.080 shall be deemed guilty of a misdemeanor."

We believe that such a person can be prosecuted under Section 341.080, supra. Sections 341.010 through 341.080, RSMo 1949, are the laws of the State of Missouri pertaining to plumbers in cities of 15,000 inhabitants or more. For a violation of Sections 341.010 through 341.070 a person may be prosecuted, in the county in which he lives, by the official in that county who is charged with the enforcement of the laws of the state, which official is, of course, the prosecuting attorney.

The Municipal Code of St. Joseph is an entirely separate body of law from the laws of the State of Missouri. In the case of Vest v. Kansas City, 355 Mo. 1, l.c. 3, the Court stated:

Honorable John E. Downs

"There is nothing in the constitution or laws of the State which prohibits a city council from enacting supplemental ordinances in addition to State laws. City of St. Louis v. Klausmeier, 213 Mo. 119, 112 S.W. 516. The fact that a state has enacted regulations governing an occupation does not of itself prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, both the statute and ordinance will stand. 'As a general rule, additional regulation to that of the state law does not constitute a conflict therewith. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescriptions.' 43 C. J. Mun. Corps. sec. 220(b)."

The Municipal Code of St. Joseph is applicable to and is enforceable only in St. Joseph. Furthermore its enforcement is the responsibility of the City Attorney of St. Joseph and not the Prosecuting Attorney of Buchanan County. If a person complies with the Municipal Code of St. Joseph and violates Sections 341.010 through 341.070, RSMo 1949, he could be prosecuted under Section 341.080, supra, even though a permit for plumbing work has been obtained.

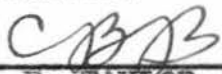
CONCLUSION

It is the opinion of this department that a person may be prosecuted for violation of a state law regulating plumbing even though he has obtained a permit to perform specific plumbing work under provisions of a city ordinance, if he violates such state law.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:



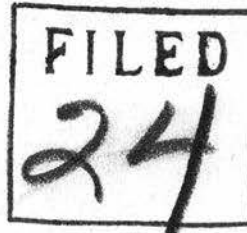
J. E. TAYLOR
Attorney General

HPWab

COUNTY COURT : County Court of Buchanan County not authorized to
COLLECTOR : budget and pay the premium on the County Collector's
BOND : bond for period greater than the current year. Not
authorized to bind subsequent courts by paying premiums a year or years in advance of the current year.

June 20, 1951

Honorable John E. Downs,
Prosecuting Attorney
Buchanan County,
St. Joseph, Missouri.



6-20-51

Dear Sir:

This will acknowledge receipt by this office of your request for an official opinion on a question which you state as follows:

"After the passage of House Bill #193 on February 27, 1951, our County Collector furnished bond in the amount of \$45,000.00 to the satisfaction of the County Court. The County Court then authorized the payment of two years premium, which amounted to \$4,625.00 and in due time demand was made by the company for the two years premium, at which time the County Auditor refused payment, although said premium can be paid for out of income and revenue provided for in the year 1951.

"The question is--can our County Court authorize the payment of this premium under the facts set out above, i.e. by contracting and paying said premium out of income and revenue provided for in the year 1951?

"We have reviewed the cases of Book vs. Earl, 87 Mo. 246; Trask vs. Livingston Co., 109 SW 659; Ebert vs. Jackson, 70 SW 2d 918; Traub vs. Buchanan County, 108 SW 2d 340; Saleno vs. City of Neosho, 30 SW 190; and Gill vs. Buchanan County, 142 SW 2d 665 and the decisions therein do not prohibit this type of expenditure. These cases uniformly prohibit the anticipation of the revenue of any future year, and also prohibit the County Court from contracting in an amount exceeding the year's income in which the debt is contracted. We found no case which prohibits the expenditure as outlined above; however, we would appreciate an opinion from your office with reference to the questions hereinabove set out."

Surety bonds for the faithful performance of duty of a public official may be made to cover the term of office of the appointed or elected official and if such official is required to pay the premium on such bond he could enter into a contract for such premium payments as could be agreed upon by the surety company, In order to take ad-

Honorable John E. Downs.

vantage of a slightly reduced rate an individual official in paying the premiums does frequently pay the premiums for his entire term of office.

However, in the question presented by you, the county court is to pay the premium on the county collector's bond, and it appears the county court is prohibited from contracting with any surety company to pay the current year's premium, i.e., for 1951, and in the same contract, attempt to bind the county to pay the premium for the following year, i.e., for 1952. Section 26(a), Article VI of the Constitution of Missouri, 1945, prohibits a county from becoming indebted in an amount exceeding in any one year the income and revenue provided for such year. Said section reads as follows:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution."

This office has ruled in an opinion rendered by this department under date of January 12, 1948, to Honorable Ralph Baird, that a county court is prohibited under Section 26(a), Art. VI, quoted above, from becoming indebted in any year in an amount in excess of the income and revenue provided for such year and a contract between the county and the surety company for payment over a four-year term of premiums on a county treasurer's bond does not bind the county for more than one year. It appears clearly enough established that while a county court is authorized to pay the premium on a surety bond for one year they are not authorized to anticipate the income and revenue of the county for several years following the year a contract becomes effective and to obligate the county to pay a like premium for a year in advance of the effective date of the contract.

As your question is presented, however, we gather the county court proposed to pay the premium on the collector's bond for two years, i.e., from the time the county collector assumes office for a two-year period through 1951 and 1952, from revenue collected in 1951.

The County Budget Law, Chapter 50, RSMo 1949, attempts to establish the county on a cash operating basis. It does not contemplate that a county court should be empowered to incur obligations for a period of more than one year for current and routine operations, nor is it contemplated that one body acting as a county court should enter into contracts exceeding one year's duration which would bind a subsequent body acting as a county court in a matter dealing with routine operation. It does not appear from a reading of the County

Honorable John E. Downs.

Budget Law that the county court is authorized therein to budget or pay from current revenue an obligation which would not become due until more than a year after the effective date of the contract. The whole of the Budget Law is replete with the concept that current operating expenses shall be met with the revenue collected in the year the indebtedness or obligation is incurred. Nowhere in the Budget Law is there any mention that the budget shall have included therein the anticipated expenditures for more than one fiscal year. But it is replete with such expressions as are found in Section 50.570, RSMo 1949, dealing with second class counties, which indicate that the county court should budget and pay from current revenue the current expenses incurred within one fiscal year for which the Budget is established:

"On or before December first of each year, each department, office, institution, commission, or court of the county receiving its revenues in whole or in part from the county shall prepare and submit to the budget officer estimates of its requirements for expenditures and its estimated revenues for the next budget year compared with the corresponding figures for the last completed fiscal year and estimated figures for the current fiscal year. The expenditure estimates shall be classified to set forth the data by funds, organization units, character and objects of expenditure; the organization units may be subclassified by functions and activities, if so directed by the budget officer.* * *"

We direct your attention also to part of Section 50.580:

"The annual budget of any such county shall present a complete financial plan for the ensuing budget year. It shall set forth all proposed expenditures for the administration, operation and maintenance of all offices, departments, commissions, courts and institutions; the actual or estimated operating deficits or surpluses from prior years;* * *".

And to part of Section 50.590:

"The budget document shall include the following:

"(1) A budget message outlining the fiscal policy of the government for the budget year and describing the important features of the budget plan, giving a general budget summary setting forth the aggregate figures of the budget in such manner as to show the balanced relations between total proposed expenditures and total expected income and other means of financing the budget compared with the corresponding figures for the last completed fiscal

Honorable John E. Downs.

year and the current fiscal year, and including explanatory schedules classifying expenditures by organization units, objects, and funds, and income by organization units, sources, and funds; * * *".

These sections illustrate that the budget plan to be followed by the counties contemplates that the current routine operating expenses of the county should be entered in the budget and paid in the current fiscal year and such routine operating expenses should not be entered in the budget and paid two and more years in advance.

The duty is enjoined upon a county court to approve the surety bond posted by the county official in question. Let us presume, as an example, that a county court paid the premium on a bond for a four-year term for a county official or entered into a contract with a surety company to do so. The action of that court would clearly be an attempt to bind subsequent bodies acting as a county court and remove from such subsequent body the opportunity to exercise their discretion in approving a bond on which premiums have already been paid and the obligations under the bond have become fixed. It was not within the contemplation of the State Legislature to authorize such action by a county court under the County Budget Law.

CONCLUSION


The County Court of Buchanan County is not authorized to Budget and pay the premium on the county collector's bond for a period beyond the current year. The county court is not authorized to pay the premium on the bond for a year or years in advance of the current year.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

JEM/ld

APPROVED:



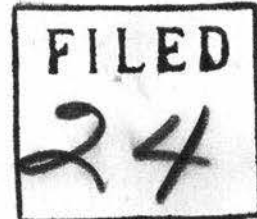
J. E. TAYLOR
Attorney-General

MAGISTRATE COURTS: In a misdemeanor case pending before a magistrate court, the State, through the prosecuting attorney, is entitled to file a motion to disqualify the magistrate on the ground of prejudice against the State.

July 2, 1951

7-6-51

Honorable John E. Downs
Prosecuting Attorney of Buchanan County
St. Joseph, Missouri



Dear Sir:

Your recent request for an official opinion has been assigned to me to answer. You thus state your opinion request:

"As you know, there are two Magistrates in Buchanan County. The question now arises whether or not the Prosecuting Attorney, having filed a misdemeanor, may come before the Magistrate before whom such misdemeanor was filed and seek a disqualification of the Magistrate by reason of his prejudice in the case.

"I have considered, with reference to this question, the following cases: State vs. Mitts, 29 S.W. (2d) 125; State vs. Slate, 214 S.W. 85; In re Bedard, 17 S.W. 693 and 22 C. J. S. 306. I have also considered the report of the proposed Rules of Criminal Procedure for the courts of Missouri, drafted as of March 28, 1951, Page 11.

"It is my view that the Prosecuting Attorney may seek to disqualify the Magistrate in a County of the Second Class by reason of prejudice for the reason that with only two Magistrates available, and the defendant clearly having such a right, the State would be irrecoverably committed to trial before the Magistrate before whom such a case is filed, even though the fact of prejudice is learned after filing."

We would first direct your attention to Section 543.220, RSMo 1949, which states:

Honorable John E. Downs

"All proceedings upon the trial of misdemeanors before magistrate shall be governed by the practice in criminal cases in circuit courts, so far as the same may be applicable, and in respect to which no provision is made by statute; provided, no instructions or declarations of law shall be given by the magistrate."

(Underscoring ours.)

We call particular attention to the underlined portion of the above section, which states that all proceedings upon the trial of misdemeanors before a magistrate shall be governed by the practice in criminal cases in circuit courts so far as such practice is applicable, "and in respect to which no provision is made by statute."

Following the directorate of Section 543.220, supra, we must therefore see whether there is any statutory enactment in regard to the trial of misdemeanors before magistrates regarding the disqualification of a magistrate in whose court a misdemeanor information has been filed, by reason of the prejudice of the magistrate, upon motion by the State. We are unable to find any such statute. Therefore, under the authority of Section 543.220, quoted above, we feel that we may now consider criminal procedure in circuit courts to determine whether there is any procedure there which is applicable to your problem.

And here we would direct your attention to Section 545.660, RSMo 1949, which states:

"When any indictment or criminal prosecution shall be pending in any circuit court or criminal court, the judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases:

"(1) When the judge of the court in which said case is pending is near of kin to the defendant by blood or marriage; or,

"(2) When the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him by blood or marriage; or,

"(3) When the judge is in anywise interested or prejudiced, or shall have been counsel in the cause; or,

Honorable John E. Downs

"(4) When the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin to or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial."

The meaning of this section was thoroughly considered by the Missouri Supreme Court, en banc, in the case of State ex rel. McAllister vs. Slate, 214 S.W. 85, in an opinion rendered June 14, 1919. (We will note here that Section 545.660, RSMo 1949, quoted above, is identical with Section 5198, R.S.Mo. 1909, which the court construed in the McAllister case.)

The McAllister case was an original proceeding in prohibition, whereby it was sought to prohibit respondent, as Judge of the Circuit Court of Cole County, from taking further jurisdiction in the trial of a case in which the State of Missouri was plaintiff and John W. Scott was defendant, the said Scott being charged with embezzlement and grand larceny.

Some time prior to the date of trial, by order of the Governor, an Assistant Attorney General, together with special counsel for the State, entered their appearance to assist in the prosecution of this case. On the date of the trial, counsel for the State announced ready for trial. At this point, the opinion states, l.c. 86:

"* * * Thereafter, but prior to the impaneling of the trial jury for the trial of the case, said Howell and Ewing became possessed, it is alleged, of information and knowledge of the existence of prejudice on the part of the respondent against the state of Missouri. The state thereupon, through its counsel, withdrew its announcement of ready for trial, and, having first obtained leave of court in that behalf, filed a formal, verified motion alleging the disqualification and incompetence of respondent to sit in the trial of the case of State v. Scott, on account of the alleged prejudice of said respondent against the state. Thereupon, on the ground of this alleged disqualification of respondent, the state moved that respondent proceed in accordance with the provisions of Sec. 5201, Rev. Stat. 1909. The latter section makes provision for the calling in of a special judge to sit in the trial of any criminal case wherein the regular judge is disqualified.

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"This motion being overruled, relator made the allegations therein and the fact of overruling such motion the grounds of application for our writ. In the petition for our writ relator avers that respondent is prejudiced against the state in said case of State v. Scott, and by reason thereof that he is incompetent to hear and determine said case, and prays that we issue our writ of prohibition to prohibit respondent from taking further proceedings in, or holding further jurisdiction therein, and from taking further cognizance of, said case.

"Our preliminary rule was, as above stated, issued, and for return thereto respondent admits all of the allegations of said petition except the fact of his prejudice in any degree in favor of the said Scott, or against the State of Missouri, which fact of prejudice he categorically denied. * * *"

The Court stated the question which was before it by virtue of the preceding facts as follows, l.c. 89:

"* * * The question of law is: Can a trial judge, absent his own voluntary disqualification, lose jurisdiction of a criminal case because of his interest or prejudice therein against the state? * * *"

91: In answering this question, the Court stated, l.c. 89, 90,

"* * * We agree with the conclusion of law upon this point of our learned commissioner and are constrained upon both reason and authority to hold the affirmative of the question stated."

* * * * *

"* * * Section 5198 read at the time the matters and things here under discussion transpired, and now reads, thus:

"When any indictment or criminal prosecution shall be pending in any circuit court or

Honorable John E. Downs

criminal court, the judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases: First, when the judge of the court in which said case is pending is near of kin to the defendant by blood or marriage; or, second, when the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him by blood or marriage; or, third, when the judge is in any wise interested or prejudiced, or shall have been counsel in the cause; or, fourth, when the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin to, or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial."

* * * * *

"It is contended by respondent's learned counsel that the terms and provisions of Sec. 5198 are applicable only to the defendant and that a circuit judge in a criminal prosecution cannot be disqualified at the instance of the state. We do not agree with this interpretation of the section. The language of the section is general, and there is nothing stated expressly or impliedly that limits the first three subdivisions of the section to applications on behalf of a defendant. It is remembered that the fourth subdivision expressly relates to application upon the part of the defendant. That subdivision provides, "when the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin to or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial," that the regular judge shall be disqualified. This section, it will be noticed, is especially liberal in favor of the defendant, and provides that the regular judge shall not sit when two reputable persons not of kin or of counsel and the defendant himself will make an affidavit that the judge will not afford him a fair trial.

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"The fact that the fourth section is by express provision applicable to the defendant, and that the other subdivisions do not mention the defendant, strengthens the conclusion that the first three subdivisions of the section are general provisions enumerating causes which shall disqualify a judge at the instance of either the state or the defendant. * * *"

The judgment in the case was that the preliminary writ of prohibition against the circuit judge be made absolute.

The question which we have to answer is whether the State can do this in the case of a magistrate before whom a misdemeanor case is pending.

Here, we again call attention to Section 543.220, quoted above. We have previously found that "no provision is made by statute" for the disqualification of a magistrate on the ground of prejudice, by the State. We are therefore of the opinion that the State would be entitled to file a motion asking, on the ground of prejudice, that a magistrate before whom a misdemeanor case was pending, be disqualified.

CONCLUSION

It is the opinion of this department that in a misdemeanor case pending before a magistrate, the State, through the prosecuting attorney, is entitled to file a motion to disqualify the magistrate on the ground of prejudice against the State.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HPWab

RECORDER OF DEEDS: It is not mandatory that recorder of deeds file a bill of sale (1) when it has neither been acknowledged nor witnessed nor (2) when it has been witnessed but not acknowledged. It is mandatory that the recorder of deeds record a bill of sale which has been proved or acknowledged according to law.

September 15, 1951

9-18-51



Honorable John E. Downs
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

We have your letter requesting an opinion of this department, which letter reads as follows:

"The Recorder of Deeds of Buchanan County has requested this office to ask you for an official opinion with reference to the following:

"1. Is it mandatory for the Recorder of Deeds to file a Bill of Sale which has neither been acknowledged or witnessed?

"2. Is it mandatory for the Recorder of Deeds to file a Bill of Sale which has been witnessed but not acknowledged?

"3. Is it mandatory for the Recorder of Deeds to record a Bill of Sale which has been acknowledged or can be proven according to law?"

We are, after a thorough search, unable to find any statute making it mandatory for the recorder of deeds to file a Bill of Sale which has neither been acknowledged nor witnessed. This, we believe, answers the first question set out above.

The reason set forth in answer to your first question is the one we find for holding that it is not mandatory for the recorder of deeds to file a Bill of Sale which has been witnessed but not acknowledged. This, we believe, answers your second question.

Section 59.330, RSMo, 1949, provides as follows:

Hon. John E. Downs

"It shall be the duty of recorders to record:

"(1) All deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices;

"(2) All papers and documents found in their respective offices, of and concerning lands and tenements, or goods and chattels, and which were received from the Spanish and French authorities at the change of government;

"(3) All marriage contracts and certificates of marriage;

"(4) All commissions and official bonds required by law to be recorded in their offices;

"(5) All written statements furnished to him for record, showing the sex and date of birth of any child or children, the name, business and residence of the father, and maiden name of the mother of such child or children."
(Underscoring ours.)

We believe that the language of the underscored part of the statute above set out is plain and especially the last part which reads as follows:

"* * *and authorized to be recorded in their offices;"

We interpret this to mean that the recorder of deeds is under no obligation to record any absolute bill of sale whether the same is properly acknowledged or proven according to law presented to him for recording as there is no statute in this state which recites that absolute bills of sale must be recorded. (See Faircloth v. Tinsley et al., 83 Mo. App. Reports 586; Kuykendall v. McDonald, 15 Mo. 416.

However, Section 428.080, RSMo. 1949, provides as follows:

"* * *and no sale of goods and chattels, where possession is delivered to the vendee, shall be subject to any condition

Hon. John E. Downs


whatever as against creditors of the vendee, or subsequent purchasers from such vendee in good faith, unless such condition shall be evidenced by writing, executed and acknowledged by the vendee, and recorded as now provided in cases of mortgages of personal property."

The above section authorizes a bill of sale containing a condition to be recorded. Kuykendall v. McDonald, 15 Mo. 416, and Faircloth v. Tinsley, 83 Mo. App. 586, both state that there is no statute requiring an absolute bill of sale of personal property to be recorded. This is a true statement of the law because only conditional bills of sale under the statute must be recorded. However, it is doubtful whether the recorder of deeds has the right to determine what is and what is not a conditional bill of sale so as to refuse to record an instrument presented to him. Weyrauch v. Johnson, 201 Iowa 1197, 208 N.W. 706 lays down the rule that the recorder of deeds is a ministerial officer without judicial power to determine the legal validity or effect of the instruments presented to him. Therefore, it would appear that the recorder of deeds is authorized to record a bill of sale if it contains a condition and what is condition is a legal question which cannot be determined by the recorder. Therefore, it would appear that the recorder is authorized to record a bill of sale.

CONCLUSION

It is, therefore, the opinion of this department that it is not mandatory that the recorder of deeds file a Bill of Sale (1) when it has neither been acknowledged nor witnessed nor (2) when it has been witnessed but not acknowledged; (3) that it is mandatory that the recorder of deeds record a Bill of Sale which has been proved or acknowledged according to law when the same is presented to him with the proper fee.

APPROVED:


J. E. TAYLOR
Attorney General

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

ABE:mw

DRAINAGE DISTRICTS,) A drainage district does not lose its
MAINTENANCE TAX:) authority to levy and collect a maintenance tax by reason of its failure to function for a period of years.

October 25, 1951

10-26-51



Honorable James Q. Donaldson
House of Representatives
Jefferson City, Missouri

Dear Mr. Donaldson:

We have given careful consideration to your request for an opinion, which request is as follows:

"It is requested that you furnish an opinion as to the power, right and authority of the Mingo Drainage District to levy and collect taxes from landowners within the district, for the purpose of maintaining levees within the district.

"The following facts are submitted for your use in preparing this opinion:

"(1) The Mingo Drainage District was incorporated by the Circuit Court of Stoddard County on April 22, 1915, for a term of fifty years, and the decree of incorporation is recorded in Book 2 at page 132 and following et seq. of the records in the Circuit Court of Stoddard County.

"(2) A Board of Supervisors was duly elected on the 19th day of May, 1915, in the city of Puxico and the Mingo Drainage District began functioning and continued to function until sometime in the year 1945, the last meeting

Honorable James Q. Donaldson

of the Board of Supervisors being held on the 2nd day of August, 1944. The last year in which a maintenance tax was levied was 1944.

"(3) On the 23rd day of May, 1951, a meeting of the landowners within the Drainage District was held in the city of Puxico pursuant to the notices published in the counties of Stoddard and Wayne, in accordance with the statutes made and provided in such cases. At said meeting of the landowners a new Board of Supervisors was elected.

"(4) This new Board of Supervisors is now desiring to repair 27 breaks in the levees of said district. The money for the restoration of the levees is available through the U. S. Army Engineers. Before the Board of Supervisor can attend to the restoration of the levees, it is necessary to know whether or not they may levy and collect taxes for the maintenance of such levees."

The board of supervisors of a drainage district organized in circuit court may levy a tax each year for the purpose of maintaining and preserving the ditches, drains, levees and other improvements of the district. The authority vested herein is contained in Section 242.-490, RSMo 1949. The wording of this statute is plain and, therefore, needs no construction.

Your problem, however, seems to be grounded in the fact that the Mingo Drainage District failed to function for a period of approximately six years. This situation raises the assumption that the corporate existence of the district might have elapsed. The statute governing this question is embodied in Section 242.140, RSMo 1949, which provides a definite procedure in circuit court for dissolving a drainage district. There is no other way in which such a district can be dissolved and its corporate existence

Honorable James Q. Donaldson

terminated before the end of the fifty-year period for which the district was chartered. The courts have held that a municipal corporation can be disincorporated only in the manner authorized by statute.

In the case of *Hambleton v. Town of Dexter*, 89 Mo. 188, the Supreme Court of Missouri, on page 191, said:

"* * * As this case must be reversed and remanded for the reasons before noted, it may not be amiss to say that the order of the county court of January 4, 1877, did not disincorporate what is called the old town of Dexter. These towns, when they are once incorporated, can only become disincorporated by resorting to the proceeding pointed out by the statute. 2 W. S., 1319 and 1320. There is no pretense in the evidence that any notice was even given as required by law; nor does the order of the county court attempt or undertake to dissolve the corporation previously made. Nor does the law authorize the incorporation of a new town out of a part of the inhabitants and territory already incorporated. This last order of the county court cannot in the least prejudice the rights of the relator to have his judgment paid by taxation or otherwise."

In the case of *State ex rel. v. Crismon*, 354 Mo. 174, the Supreme Court of Missouri, on page 178, sustained this principle, as follows:

"In 1 Dillon's *Municipal Corporations*, 5th Ed., sec. 338, p. 591 it is said: 'The doctrine of a forfeiture of the right to be a corporation has also, it is believed by the author, no just or proper application to our municipal corporations. . . . In short, unless otherwise specially provided by the legislature, the nature and constitution of our municipal corporations, as well

Honorable James Q. Donaldson

as the purposes they are created to subserve, are such that they can, in the author's judgment, only be dissolved by the legislature, or pursuant to legislative enactment. They may become inert or dormant, or their functions may be suspended, for want of officers or of inhabitants; but dissolved, when created by an act of the legislature, and once in existence, they cannot be, by reason of any default or abuse of the powers conferred, either on the part of the officers or inhabitants of the incorporated place. As they can exist only by legislative sanction, so they cannot be dissolved or cease to exist except by legislative consent or pursuant to legislative provision.'

"To the same effect is 1 McQuillin's Municipal Corporations, 2d Ed., sec. 317, pp. 380-381: 'A municipal corporation can only be dissolved in the manner prescribed by law . . . Thus a municipal corporation is not ipso facto dissolved or destroyed by a non-user of its powers, in whole or in part, or failure of a term of years to exercise the functions of a municipality, since a judicial sentence or legislative act is necessary to effect a dissolution. In such case the municipal corporation would be suspended for the time, but not civilly dead, since its dormant functions could be revived without action on the part of the sovereignty, the sources from which, in theory of law, corporate life originally came. The result would be the same should all of the inhabitants remove without the corporate limits. The remedy for failure to exercise municipal powers or for illegal acts or misconduct of the officers or agents of the corporation is not dissolution or forfeiture of the charter.'

"The same author says in Sec. 318: 'A municipal corporation is not dissolved

Honorable James Q. Donaldson

by the mere failure to elect or appoint officers and agents to conduct its government, for its continuance as a legal entity does not depend on the existence of officers.'"


CONCLUSION

It is the opinion of this office that the Mingo Drainage District, under the facts stated in your letter, has not lost its corporate existence and is vested with power and authority to levy and collect taxes from landowners within the district for the purpose of maintaining levees and other improvements made by said district.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

BAT/fh

SOCIAL SECURITY:
SCHOOLS:
COUNTY SUPERINTENDENT
OF SCHOOLS:

The clerical assistant to the county superintendent of public schools is an employee of the county and social security deductions and matching payments shall be made by the county when the county participates in social security under Senate Bill No. 3.
October 25, 1951

Honorable John E. Downs
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri



Dear Sir:

We have on hand your request for an official opinion of this department which reads as follows:

"Section 167.190 Revised Statutes of Missouri, 1949 provides that the State shall pay \$750 for a Clerical Assistant to the County Superintendent of Public Schools. The same section provides for a maximum salary of \$1500 per year. The Clerical Assistant to our County Superintendent of Schools receives the sum of \$1500 per year.

"Our County Court has elected to come under the Social Security Plan effective January 1, 1951. The question arises as to whether the State contributes the one and a half percent for the \$750 contributed by the State for the Clerical Assistant hereinabove mentioned.

"I have been informed that the County has received a check from the State in the amount of \$750, indicating of course that no deductions were made by the State for Social Security.

"Would you please advise this office as to whether or not we should make a full deduction from the wages of this particular employee, or whether or not the State and the County withholds and contributes in proportion to the amounts paid respectively by the County and State."

Honorable John E. Downs

The State of Missouri has authorized the coverage of officers and employees of the state, its subdivisions, and instrumentalities under the Old Age and Survivors insurance system of the Federal Social Security Act, 42 U.S.C.A., Section 1400, et seq., Buchanan County has become a participant in the system for its officers and employees.

You have asked whether or not the county should make full deduction from the wages of the clerical assistant to the County Superintendent of Schools, under the provisions of Senate Committee Substitute for Senate Bill No. 3, hereafter referred to as Senate Bill No. 3.

Section 167.190, RSMo 1949, is quoted in parts referring to this clerical assistant as follows:

"* * * The county superintendent of public schools shall be permitted to employ clerical assistance, to whom there shall be paid not less than seven hundred and fifty dollars nor more than one thousand five hundred dollars annually to be determined and fixed by the county court, seven hundred and fifty dollars of which shall be paid by the state out of state school moneys, the same to be included by the state board of education as a part of the apportionment made before August thirty-first of each year. * * * The county treasurer shall upon presentation of a proper bill by such clerical employee, or employees, such bill having been approved by the county superintendent and audited by the county court, draw a warrant each month for payment of same out of moneys provided by the state for such purpose, * * * provided further, that all warrants in payment for clerical hire shall be drawn in favor of the person or persons who render such services and in no case shall the county superintendent personally receive any part thereof."

There has been no deductions by the state out of the \$750 sent to Buchanan County for payment of the clerical assistant to the Superintendent of Schools of Buchanan County.

Honorable John E. Downs

In Section 167.190, quoted above, we desire to restate a portion thereof for emphasis: "The county treasurer shall ... draw a warrant each month for the payment of same out of moneys provided by the state for such purpose." Although the State of Missouri provides \$750 per annum for the purpose of this clerk hire by the statute, by the terms of the statute the state does not pay the salary to the clerk. The same may be characterized as a grant to the county from the state for a specified purpose. The same is paid by the county treasurer out of money provided by the state. It is not the entire salary although by the maximum limit of \$1500 in the statute, it is one-half of it.

This seems to be distinctly a county function and the clerical assistant seems to be a county employee. In the recent case of Shamburger v. Commonwealth et al. 240 S.W. (2d) 636, the Court of Appeals of Kentucky, deciding the case under Kentucky's state participation in the Federal Old Age and Survivors insurance act, said at l.c. 637:

"The fundamental point, it seems to us is the fact that contributions (or excise taxes) required by the law to be paid by both employers and employees, is a percentage of wages or compensation paid and received. 26 U.S.C.A. secs. 1400, 1410. Therefore, so far as liability for payment is concerned, the controlling point is the source of the compensation, i.e., who pays the salaries."

Senate Bill No. 3, Section 6, subsection 5, is as follows:

"The state comptroller at the end of each quarter shall certify to the state treasurer the amount of the state's share of the contributions required to be paid to the federal agency on account of the officers and employees of each department, division, agency or unit of state government whose services are covered by an agreement entered into under section 2. Thereupon the state treasurer shall immediately transfer such amounts from the proper funds from which the officers and employees were paid to the credit of the contribution fund."

Honorable John E. Downs

We believe from this that the Legislature did not intend for the comptroller to cause the extraction (from every payment made) of contributions from the salaries to be paid out of every payment of state money. This certainly refers to state officers and employees and the clerical assistant is, in our opinion, distinctly a county employee.

CONCLUSION

Therefore, it is the opinion of this department that a clerical assistant to the county superintendent of schools is an employee of the county and if such position is otherwise eligible to social security under Senate Bill No. 3, full deductions should be made from the wages paid to such employee. The state should not withhold social security payments from the money paid for such clerical hire.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JWfab

SOCIAL SECURITY:
COUNTY FARM BUREAU:

The employees of the County Farm Bureau are not county employees under the provisions of Senate Bill No. 3, the County Farm Bureau being an instrumentality.

October 25, 1951

10/26/51



Honorable John E. Downs
Prosecuting Attorney of
Buchanan County
St. Joseph, Missouri

Dear Sir:

Reference is made to your request for an opinion of this department which request reads as follows:

"Mr. Elmer L. Pigg's letter of August 2, 1951, which was addressed to all County Clerks, has been referred to this office for an opinion.

"Mr. Pigg's letter states that it is his opinion that employees of the Farm Bureau should be considered as County Employees, thus coming under the Old Age and Survivors Insurance provisions.

"Our County issued its' warrants to the Farm Bureau itself, and has no part in the payment of salaries to any employees of the Farm Bureau. I assume that this is the practice throughout the state. Has your office rendered an opinion with reference to this problem, and if not, would you please render one to us at your earliest convenience with reference to whether or not the employees of the Farm Bureau are to be considered County Employees, thus coming under the Old Age and Survivors Insurance Law.

Your question requires an interpretation of Senate Committee Substitute for Senate Bill No. 3 of the 66th General Assembly with regard to the status of the County Farm Bureau. The necessity for

Honorable John E. Downs

such determination is obvious in view of the fact that the bill provides that employees of the state shall be covered under the old-age and survivors insurance provisions of Title 2 of the Federal Social Security Act and employees of political subdivisions or instrumentalities of the state or subdivision may be covered. This optional coverage afforded to political subdivisions and instrumentalities is affected by an agreement entered into between the state agency and the political subdivision or instrumentality.

You have stated that you are in disagreement with Mr. Pigg's letter of August 2, 1951, which stated "that it was his opinion that employees of the Farm Bureau should be considered as county employees, thus coming under the old-age and survivors insurance provisions when the county accepted the benefits.

The law providing for county farm bureaus is found in Chapter 262, Sections 262.550 to 262.620. Section 262.560, RSMo 1949, defines a county farm bureau as "a body corporate formed for the purpose of cooperating with the University of Missouri College of Agriculture in carrying out the provisions of the Smith-Lever Act of Congress approved May 8, 1914, composed of not less than two hundred and fifty members, with an annual membership fee of not less than fifty cents per member fully paid up, its constitution and bylaws formally adopted and its officers elected and installed." It is provided in the act itself, that the purpose of such organization shall be that of "promoting the public welfare and to aid in diffusing among the people of the State of Missouri useful and practical information on subjects relating to agriculture, home economics and rural life and to encourage application of the same," and must have for its objects:

- "(1) To promote the development of profitable and permanent systems of agriculture;
- "(2) To assist in securing wholesome and satisfactory living conditions in the county;
- "(3) To encourage the development and successful growth of all rural social and educational institutions;
- "(4) To assist in safeguarding rural public health through community cooperation;
- "(5) To develop better economic and business methods and practices in farm and home life;

- "(6) To cooperate with all individuals, groups, institutions, and organizations whose purposes are in accord with the objects set forth in this section."

The act further provides that whenever a county farm bureau has been organized with the required number of members, with its membership dues fully paid up, its constitution and bylaws adopted, and its officers elected and installed, the county court is empowered and authorized and shall appropriate out of the general funds of the county sums to be administered by the county farm bureau, within the amounts "specified" in Section 262.580, RSMo 1949.

Section 262.590, RSMo 1949, provides that all funds appropriated by the county court shall be used to pay the salary and necessary expenses of men and women trained in agriculture and home economics respectively, and also for necessary clerical assistance and office equipment. Said section provides as follows:

"For the purpose of carrying out the provisions of sections 262.550 to 262.620, all funds appropriated by any county court to a county farm organization shall be used to pay the salaries and necessary expenses of men and women, either or both, trained in agriculture and home economics respectively, to serve as county agriculture agents, county home demonstration agents, and county boys' and girls' club agents, and to provide such clerical assistance and office equipment as may be necessary to the effective conduct through these agents, of such educational activities as are specifically authorized by state and federal legislation providing for cooperative extension work in agriculture and home economics as defined by the Smith-Lever Act of congress. The office or headquarters of any county agriculture agent, county home demonstration agent or county boys' and girls' club agent as provided for in sections 262.550 to 262.620 shall be maintained at the county seat of each county."

The county agriculture agent, county home demonstration agent, county boys' and girls' club agent, and their clerical assistants are neither appointed, elected or employed by the county nor does the county have any control over such agents, employees or officers of the county farm bureau other than that an annual budget report shall be submitted to the county court.

Honorable John E. Downs

Section 262.600, RSMo 1949, provides that at the close of each month the secretary shall requisition the county court for the total amount of the months' expenses. The county court has no authority or discretion to approve or disapprove such requisition other than they shall not exceed one-twelfth of the total amount appropriated for the year with the added exception that if a reserve shall be accumulated, it shall be available for current expenses.

From the foregoing it is quite obvious that the agents and their clerical assistants are not officers or employees of the state nor do we believe that they are officers or employees of the county. On the contrary, we are of the opinion that the farm bureau is an instrumentality as defined in the act.

Section 1, subsection 6, of Senate Bill No. 3, defines the term instrumentality as follows:

"'Instrumentality', an instrumentality of a state or of one or more of its political subdivisions but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or such political subdivision and whose employees are not by virtue of their relation to such juristic entity employees of the state or such subdivision."

The provisions for creating a farm bureau have been universally accepted as a valid exercise of the legislative power of the state. Jasper County Farm Bureau v. Jasper County, 315 Mo. 560; Cloud County Farm Bureau v. County Commissioners, 126 Ka. 322; State ex rel. Hall County Farm Bureau et al. v. Miller et al., 104 Neb. 838. Once created, they are the body through which vital agricultural information is communicated to farmers of the respective counties. They are in a sense an instrumentality through which this information is disseminated.

The term instrumentality is defined in the act to be a juristic entity. Funk and Wagnalls New Standard Dictionary lists the word "juristic" as an adjective and defines it as follows: "of or pertaining to a jurist, or the profession of law." The term "juristic act" is defined as "a proceeding intended to have a legal effect and having the necessary qualifications." Ordinarily the only entity which must possess prescribed or necessary qualifications to receive legal sanction and recognition is a corporation. The legislature might well have used the term legal entity descriptive of a corporation rather than juristic. However,

Honorable John E. Downs

we believe that it was calculated to have the same effect. The term juristic entity is not unfamiliar to the courts of this state. The following is found in the case of State ex inf. McKittrick v. Missouri Utilities Co., 339 Mo. 385, 1. c. 399, "a corporation is, in law a person. It is a juristic entity separate and apart from the persons who happen to be its shareholders and its creditors, secured and unsecured." This instrumentality defined to be "juristic" or legal entity may be considered as such only if it is "legally separate and distinct from the state or such political subdivision." We can think of no instrumentality which is separate and distinct, used in the broadest sense, from its superior. However, this phrase is qualified by the term "legally" i.e., "legally separately and distinct." Such terminology is familiar to the law of corporations. Evidence of such is found in the rule stated in 18 C. J. S., Corporations, Section 4, Chapter 368, " * * a corporation is regarded as a legal entity, separate, distinct, and apart from the members who compose it." Likewise, see I Thompson on Corporations, page 14, "The legal fiction is that a corporation is an entity distinct and separate from its officers, directors and stockholders, * * *." Neither in its broadest sense is a corporation separate and distinct from its officers, directors and stockholders but only has such separability as is provided by law, i. e., the right to sue and to be sued in its own name, to purchase property, etc.

A county farm bureau is not in all respects completely separate and distinct from the state from whom it derives its authority nor from the county from whom it receives compensation. However, we do not believe that this will prevent it from being an entity legally separate and distinct from the state or county. The following verification of this conclusion is found in the case of Virginia Mason Hospital Ass'n. v. Larson, et al., 114 P. (2d) 976, the Supreme Court of Washington defined the term separate entity as follows:

"We do not believe that lack of independence from other organizations is the test of whether an institution is a separate entity. Every institution is in a measure dependent upon the functioning of other institutions which provide goods and services necessary for the efficient operation of the former. But each may be, nevertheless, a completely separate entity. If the control of each of these institutions were in separate hands, it would be clearly evident that the mere interdependence for goods and services would not merge identity of these organizations."

We are of the opinion that a county farm bureau as a body corporate is a juristic entity legally separate and distinct

Honorable John E. Downs

from the state and county and whose employees are not employees of the state or county. The county agents and their employees are not appointed by the state or county and are in no way under their control neither are they paid by the state or county but an appropriation is made to the farm bureau and administered by the farm bureau.

CONCLUSION

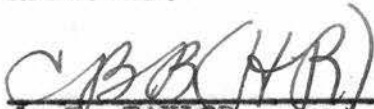
Therefore, it is the opinion of this department that the employees of the county farm bureau are not county employees under the provisions of Senate Bill No. 3.

We are further of the opinion that the county farm bureau is an instrumentality as defined in the act, and that its employees may be covered under the old-age and survivors insurance provisions of Title 2 of the Federal Social Security Act only by an agreement entered into directly with the state agency.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

DDG:hr

LABOR:

Employees of a nursing home or "rest haven" does not fall within Section 290.040, RSMo 1949, Hours of labor of female employees.

April 25, 1951

5-1-51



Mr. L. L. Duncan, Director
Division of Industrial Inspection
Department of Labor and Industrial
Relations
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting an opinion from this office which reads as follows:

"On numerous occasions this division has been requested to advise as to whether or not nursing homes or 'rest havens', which a great many of the places are called, which employ female help or nurses come under the jurisdiction of Section 7815, Laws of Missouri, 1913, - Hours of Labor of Female Employees."

Section 7815, Laws of Missouri 1913, which you refer to is now Section 290.040, RSMo 1949, and provides:

"No female shall be employed, permitted, or suffered to work, manual or physical, in any manufacturing, mechanical, or mercantile establishment, or factory, workshop, laundry, bakery, restaurant, or any place of amusement, or to do any stenographic or clerical work of any character in any of the divers kinds of establishments and places of industry, herein described, or by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four

Mr. L. L. Duncan, Director

hours during any one week; provided, that operators of canning or packing plants in rural communities, or in cities of less than ten thousand inhabitants wherein perishable farm products are canned, or packed, shall be exempt from the provisions of this section for a number of days not to exceed ninety in any one year; provided further, that nothing in this section shall be construed and understood to apply to telephone companies."

A well settled rule of statutory construction is that as stated in *State ex inf. Conkling, ex rel. v. Sweaney*, 270 Mo. 685, at page 692, "That the expression of one thing is the exclusion of another."

Before the employees of a "rest haven" described in your question can be within the application of Section 290.040, RSMo 1949, they must be found within its terms.

A nursing home or "rest haven" is not a "manufacturing, mechanical or mercantile" establishment because nothing is manufactured or sold and it is clearly not a "factory, laundry, restaurant, or place of amusement." A "workshop" is defined in Vol. 45, Words and Phrases, page 534 as follows:

"The term workshop, * * *, means any premises, room, or place, not a mill or factory, wherein manual labor is exercised for purposes of cleaning or adapting for sale any article or part thereof, * * *."

A nursing home as here considered lacks the elements of being one wherein manual labor is exercised for purposes of cleaning or adapting for sale any article or part of an article.

Clearly, such a home is not engaged in any "express or transportation or public utility business." Not being a "common carrier" the only other category is that of "public institution."

A nursing home is not within the term "public institution" and is shown by the following found in the case of *Allen v. American Life and Accident Insurance Co.*, 119 S.W. (2d) 450, at page 453:

"* * * Such records of a private hospital are admissible in evidence because the statute requires them to be made and kept,

L. L. Duncan, Director

but this does not convert the private hospital into a public institution or make its employees public employees appointed and accredited by governmental authority and acting as such under their official oaths. Such employees are still private employees of a private institution. * * *

(Emphasis ours.)


CONCLUSION

Therefore the opinion of this department is that female employees of a nursing home or "rest haven" do not fall within the purview of Section 290.040, RSMo 1949, prohibiting certain establishments from employing female labor for a longer period than nine hours in one day or fifty-four hours in one week.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

DDG:hr

WOMEN: Nurses employed by manufacturing and
LABOR: mercantile establishments not within
INDUSTRIAL INSPECTION: provisions of statute relating to
HOURS OF WORK: maximum hours of work by women.



July 25, 1951

7-25-51

Mr. L. L. Duncan, Director
Division of Industrial Inspection
Department of Labor and Industrial Relations
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"On numerous occasions during the past three months the writer has been asked about Section 290.040, RSMo 1949, as to whether or not it applies to industrial nurses, such nurses employed by manufacturing and mercantile establishments and who are usually required to do general first aid work, render professional service of medical or surgical nature under the direction of a physician, and maintain medical and clerical records."

Section 290.040, RSMo 1949, provides as follows:

"No female shall be employed, permitted, or suffered to work, manual or physical, in any manufacturing, mechanical, or mercantile establishment, or factory, workshop, laundry, bakery, restaurant, or any place of amusement, or to do any stenographic or clerical work of any character in any of the divers kinds of establishments and places of industry, herein described, or by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or by any public

July 25, 1951

institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four hours during any one week; provided, that operators of canning or packing plants in rural communities, or in cities of less than ten thousand inhabitants wherein perishable farm products are canned, or packed, shall be exempt from the provisions of this section for a number of days not to exceed ninety in any one year; provided, further, that nothing in this section shall be construed and understood to apply to telephone companies."

In order to determine whether or not industrial nurses are included within the provisions of such statute, we must determine whether or not the nurses are performing "manual or physical work" or doing any "stenographic or clerical work" in any of the kinds of establishments and places described in such statute. We believe that the work done by nurses should be classed as "professional" rather than "manual or physical."

In the case of Mayor and City Council of Baltimore v. Smith, 177 Atl. 902, the Court of Appeals of Maryland held that a nurse employed in the Baltimore City Hospital was not a "manual or industrial worker." The court said l.c. 905:

"It is obvious that a hospital is not an industrial enterprise, and that a trained nurse, whether classified as pupil, practical, or registered, is, in the course of her vocational employment, a professional, and not a manual or industrial, worker. This conclusion is in harmony with common usage of the terms."

* * * * *

"It is argued that, although a trained practical nurse, she was within the act because the performance of her duties as a nurse required her to scrub and clean tables, chairs, and other articles for use in the wards and to

Mr. L. L. Duncan

July 25, 1951

prepare beds for the patients and to incur the risk of infections and contagious diseases. The answer to this is that the manual labor mentioned is simply incidental to the profession of nursing and does not destroy its principal and essential quality, which is the special and professional knowledge, technical skill, and experience that comes from the instruction, training, and exercise of the nurse's mental faculties."

It is our view, therefore, that an industrial nurse does not engage in "manual or physical work."

We assume from the information given in your opinion request that all of the records maintained by the nurses about whom you inquire are the records of their work and are a part thereof. Since the keeping of the records is merely incidental to the employment as a nurse, we believe it to be clear that the nurse is not engaged in stenographic or clerical work for the establishment for which she works, but is merely performing that which is necessary in her employment as a nurse.

It is our view, therefore, that an industrial nurse who keeps medical and clerical records in connection with her occupation is not engaged in stenographic or clerical work for the establishment for which she works.

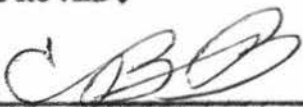
CONCLUSION

It is the opinion of this department that Section 290.040, RSMo 1949, does not apply to industrial nurses employed by manufacturing and mercantile establishments, where the work done by such nurses is to render first aid work, render professional service of medical or surgical nature under the direction of a physician, and maintain medical and clerical records.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

CBB:lrt

OATHS: Notaries public, Commissioners of deeds,
ELECTIONS: army officer above rank of lieutenant,
naval officer above rank of ensign and
Kansas City election officials are
officers "authorized by law to administer
oaths.

February 7, 1951

FILED 26



Board of Election Commissioners
County Courthouse
Kansas City 6, Missouri

Attention: Mr. Wm. E. Tipton
Attorney

Gentlemen:

This will acknowledge receipt of your letter dated
January 25, 1951, requesting an opinion from this department
on the following question:

"The Kansas City Board of Election
Commissioners would like to have an
opinion from your office setting forth
what persons fall within the category
of 'any officer authorized by law to
administer oaths,' and also specifying
what persons the Board is obliged by
law to recognize as 'any officer author-
ized by law to administer oaths,' in
other states."

For your information and guidance, there is enclosed an
opinion from this office addressed to the Honorable Horace T.
Robinson, prosecuting Attorney of Pulaski County, under date
of July 18, 1950, which you may find helpful.

Because of the wide scope of your question, we are limited
to directing your attention to a part of those statutes author-
izing named officers to administer oaths.

By the terms of Section 486.020, R. S. Mo. 1949, notaries
public are authorized to administer oaths generally in the
following terms:

"They may administer oaths and affirma-
tions in all matters incident or belonging
to the exercise of their notarial offices.
They may receive the proof or acknowledg-
ment of all instruments of writing relating

Board of Election Commissioners

to commerce and navigation, take and certify relinquishments of dower and conveyances of real estate of married women; the proof or acknowledgment of deeds, conveyances, powers of attorney and other instruments of writing, in like cases and in the same manner and with like effect as clerks of courts of record or authorized by law; take and certify depositions and affidavits and administer oaths and affirmations, and take and perpetuate the testimony of witnesses, in like cases and in like manner as magistrates are authorized by law; make declarations and protests, and certify the truth thereof under their official seal, concerning all matters by them done by virtue of their offices, and shall have all the power and perform all the duties of register of boatmen."

Section 492.010, R.S. Mo. 1949, under the title "Officers authorized to administer oaths," reads as follows:

"Every court and judge, justice and clerk thereof, and all magistrates, shall respectively have power to administer oaths and affirmations to witnesses and others concerning any thing or proceeding depending before them, respectively, and to administer oaths and take affidavits and depositions within their respective jurisdictions, in all cases where oaths and affirmations are required by law to be taken."

Under the title "Oaths required to be taken before particular officer may be taken before others, when," Section 492.020, R.S. Mo. 1949, further extending the power of particularly named officers who are authorized to administer oaths, states the following:

"Whenever any oath or affirmation is required by law to be taken before a particular court or officer, the same may be done before any other court or officer empowered to administer oaths, unless it is expressly prohibited; and

Board of Election Commissioners

when no court or officer is named by whom an oath may be administered or affidavit taken, the same may be done by any court or officer authorized to administer oaths."

Section 486.100, R.S. Mo. 1949, provides for the appointment of "Commissioners of deeds in other states," and is followed by Section 486.130 authorizing such commissioners to administer oaths in the following words:

"Every commissioner shall have power to administer any oath which may be lawfully required in this state, to any person willing to take it; and to take and certify all depositions to be used in any of the courts of this state, in conformity to the laws thereof, either on interrogatories proposed under commission from a court of this state, or by consent of parties, or on legal notice given to the opposite party; and all such acts may be as valid as if done and certified according to law by a magistrate in this state."

Army officers above the rank of lieutenant and Navy officers above the rank of ensign are authorized to administer oaths by Sections 492.070 and 442.170, R.S. Mo. 1949, which sections read as follows:

Sec. 492.070. "Oaths, affirmations and commissions to take the deposition of any person without this state engaged in the military service of the United States may be executed before and by an officer in the said service above the rank of lieutenant; and of any person engaged in the naval service of the United States before any officer in that service above the rank of ensign; and affidavits and depositions of such persons so taken, if otherwise taken in accordance with law, shall be received and may be used in evidence, or for any other purpose, in the same manner as if taken before any officer now authorized by the laws of this state to administer oaths and affirmations or take depositions."

Board of Election Commissioners

Sec. 442.170. "For the purpose aforesaid, the officers named in section 442.160 shall have the same power and authority to administer oaths and affirmations and take depositions, affidavits and acknowledgments of persons in the military or naval service of the United States in accordance with provisions of sections 442.160 and 492.070, RSMo 1949, as officers now authorized by the laws of this state for like purposes. The certificates of the officers referred to in sections 442.160 and 492.070, RSMo 1949, of their rank shall be prima facie evidence thereof."

Section 117.280, R.S. Mo. 1949, enumerates the election officials in Kansas City who are authorized to administer oaths in the following terms:

"All oaths in writing provided for in this chapter must have a jurat, or certificate of the officer taking the same, attached and signed by him; and said election commissioners, said assistants of the board of election commissioners or other employees assigned to take registrations and said judges of election are hereby empowered to administer all oaths and affirmations required in the administration of the affairs of their several offices without charge therefor."

By listing the sections quoted above we do not purport to include all officers authorized by law to administer oaths. However, authorization for administering oaths most commonly coming before the Board of Election Commissioners is included herein. The broad scope of the question presented does not allow a more detailed discussion, and if you have questions arising which are not covered by the sections quoted herein this office will assist you, upon request, with your particular problems.

CONCLUSION

Authorization for officers to administer oaths may be found in Revised Statutes of Missouri, 1949, Section 492.010;

Board of Election Commissioners

for notaries public to administer oaths, Section 486.020; for commissioners of deed to administer oaths, Section 486.130; for Army and Navy officers to administer oaths, Sections 492.070 and 442.170; for election officials in Kansas City to administer oaths, Section 117.280.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JEM:ml
Enc.

FOUR QUESTIONS:

Sale of convict made goods,
wares and merchandise.

) Convicts cannot legally enter into
) contract with third persons, for
) the purchase of convict made goods,
) wares or merchandise, made on their
) own time, using their own materials,
) purchased with their own funds.

September 17, 1951

9-17-51

Hon. Ralph N. Eidson, Warden
Missouri State Penitentiary
Jefferson City, Missouri



Dear Mr. Eidson:

Your letter of recent date requesting an opinion of this department on the legal right of the Department of Corrections to operate a retail sales stand in the penitentiary for the purpose of selling articles of goods, wares and merchandise made by prisoners in their spare time, using their own material, and purchased with their own funds, contains four separate questions.

Owing to the length of your letter we are for the purpose of this opinion setting out only the four questions which read as follows:

- "Question 1: What is our legal right to conduct a retail sales stand for the sale of novelty and hobby items made by the inmates of the penitentiary during their own spare time, using materials purchased by the inmate with his own funds?
- "Question 2: Does an inmate have the legal right to enter into a contract to furnish items to a store or private individual for re-sale, either within the state or outside the state?
- "Question 3: Does the novelty stand have the legal right to furnish items from the stand to retail vendors within the State of Missouri?

Hon. Ralph N. Eidson, Warden

"Question 4: Can items made by the inmate on a hobby and novelty basis for his own mental well-being and small income, be freely admitted into interstate commerce?"

We have made a search of the law on the subject of the operation of a retail sales, novelty and hobby stand, and have been unable to find any statute dealing with this type of outlet for goods, wares, or merchandise made by the inmate while in the penitentiary.

The rule or principle of law governing the sale and transportation of prison made goods, would, we think, apply to the articles of goods, wares and merchandise made by convicts on their own time, using their own materials, which are purchased with their own funds while confined in the penitentiary.

We will take up your questions in chronological order:

Question No. 1

Section 216.090, R. S. Mo. 1949 reads in part as follows:

"In the correctional treatment applied to each inmate, reformation of the inmate, his social or moral improvement and his rehabilitation toward useful, productive and law-abiding citizenship shall be guiding factors and aims.

* * * * *

We think the plan intended by the terms of the above quotation is sufficiently broad enough to give legal right to the maintenance and operation of the retail sales stand by the Department of Corrections as an inducement to the inmates to occupy and improve themselves in preparation for a better social life upon their dismissal from the institution.

This section applies to each inmate under the jurisdiction of the Department of Corrections in all branches of penal institutions thereunder, and should be dealt with, with the same object and

Hon. Ralph N. Eldson, Warden

purpose in mind, that is the reformation, social and moral improvement and rehabilitation of the inmate to become a productive, law-abiding citizen as the guiding factors, while within the custody of the Department of Corrections, and to conduct an outlet for the articles made by the inmates in their spare time using their own material, purchased with their own funds, would be in keeping with the provisions of the above mentioned section.

Question No. 2

We note this question is prompted by an inquiry from Representative Paxton H. Ackerman, of the City of St. Louis and seems to be the principal question in your request.

Persons convicted of a crime and sentenced to the penitentiary, upon being received and admitted, forfeit all their civil rights during the time they are confined therein, and until such disability is removed, either by operation of the law or by an act of the Governor.

Section 222.010, R. S. Mo. 1949 provides as follows:

"A sentence of imprisonment in the penitentiary for a term less than life suspends all civil rights of the persons so sentenced during the term thereof, and forfeits all public offices and trust, authority and power; and the person sentenced to such imprisonment for life shall thereafter be deemed civilly dead."

In the case of Ward v. Morton, 242 S. W. 966, the question arose as to the right of a convicted felon being legally competent to make a warranty deed for the transfer of real estate, and our court said at l. c. 969:

"* * * While we find no authority directly in point in this state, we do find precedent by analogy in other jurisdictions. Thus in Harmon v. Bowers, 78 Kan. 135, 96 Pac 51, 17 L.R.A. (N.S.) 502, 16 ann. Cas. 121, under statutes of Kansas almost identical with those of Missouri, it was held that the suspension of the civil rights of a person sentenced to the penitentiary for a term less than life did not begin until the date of actual imprisonment under the sentence, and that a deed executed before confinement, and while execution of the judgment of conviction was stayed by an appeal, was valid. In Ex parte Jones and Ellwood, 41 Cal. 209, it was held that a convict released on bail was not to be considered imprisoned during the time of such release. In 13 C. J. 915, the rule is

Hon. Ralph N. Eldson, Warden

laid down that 'the statutory disabilities (suspension of civil rights) continue only during the imprisonment.'"

In the case of O'Reilly v. Cleary, 8 Mo. App. 186, 1. c. 190, the court said:

"The law provides that a sentence of imprisonment in the penitentiary suspends all civil rights of the convict during the term."

This was a case where the convict, after being discharged from the penitentiary tried to recover money paid out on a contract while confined in the penitentiary and the court held that his civil rights being suspended, he was not competent to make contract and could not recover on the same.

Thus imprisonment in the penitentiary suspends an inmate's civil rights, of which the right to enter into contract is one, and until such disability has been removed the inmate cannot legally enter into a contract. Therefore, in answering Question No. 2, the question raised by Representative Ackerman, the answer would be in the negative, and a contract made by an inmate to furnish items to a store or a private individual would not be a valid legal contract and would be nonenforceable.

Question No. 3

We are unable to find any statute prohibiting sales to retail vendors from the novelty and hobby stand at the penitentiary. We think the principles embodied in Section 216.090, supra, would permit sales in any quantity at the stand to anyone desiring to purchase same.

Question No. 4

This question involves the interpretation of the Federal Statute affecting the transportation of prison made goods in interstate commerce.

Section 1761, Chapter 85, Title 18, U.S.C.A., reads as follows:

"Sec. 1761. Transportation or importation

(a) Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(b) This chapter shall not apply to agricultural commodities or parts for the repair of farm machinery, nor to commodities manufactured in a Federal District of Columbia, or State institution for use by the Federal Government, or by the District of Columbia, or by any State or Political subdivision of a State. June 25, 1948 c. 645, 62 Stat. 785."

The above section had its source in 54 Statute 1134, and was approved on October 14, 1940, to become effective one year after that date, being Section 396a of the 1940 addition, U. S. Code, Title 18, and was later amended by 55 Statute 581, which amendment, however, did not change the substance of the original statute. By 62 Statute 785, the former statute was again reenacted with change in form but no change in substance, and became effective June 25, 1948.

The original statute had in parenthesis, the following phrase, "except convicts or prisoners on parole or probation", in the 1948 statute the parenthesis were omitted and commas were substituted. We think, however, the later statute should be read as though the parenthesis were still there, making the exception apply to convicts or prisoners who are on parole or probation, then the statute, with reference to the manufacture and production of the articles, would mean:

Whoever shall knowingly transport in interstate commerce, or from any foreign country into the United States, any goods, wares and merchandise, manufactured, produced or mined, wholly or in part by convicts or prisoners in any penal or reformatory institution, except convicts or prisoners on parole or probation, would be subject to the penalties provided for in Section 1761, Title 18, U.S.C.A.

Hon. Ralph N. Eidson, Warden

CONCLUSION

It is the opinion of this department that, under the law the Department of Corrections can legally operate and maintain a novelty and hobby stand for the purpose of offering goods, wares and merchandise made by inmates in their spare time, using materials purchased with their own funds as a step towards reformation, social and moral improvement and the rehabilitation of such inmates in an effort to make them law-abiding citizens upon being discharged.

Further, it is the opinion of this department that a contract entered into by inmates with a store or private individual for the resale, either in this State, or outside of this State, of the goods, wares and merchandise made by them in their spare time, using their own merchandise and purchased with their own funds, would be void and nonenforceable.

We are of the further opinion that if a retail vendor makes quantity purchases at the hobby and novelty stand, spoken of herein, and offers them for resale he does so at his own risk.

It is further the opinion of this department that the novelty and hobby items made by inmates of the penal institutions of the State of Missouri, which are made for their own mental well-being and small income cannot be freely admitted into interstate commerce.

Respectfully submitted

GORDON P. WEIR
Assistant Attorney General

APPROVED:



J. E. TAYLOR
ATTORNEY GENERAL

GPW:A

TAXATION:
PROPERTY CLASSIFICATION:

Billboard annexed to land presumably under lease agreement between billboard owner and landowner, with right of removal ordinarily reserved in lessee at end of term, in absence of intention of parties to contrary; billboard does not become part of, or any interest in land, and for tax purposes under Sec. 137.010, RSMo 1949, should be classified as tangible personal property and not as real property. Corporation owned bill board to be assessed in county where billboard is situated under Sec. 137.095. If individually owned to be assessed in county of owner's residence, under Sec. 137.090.

March 21, 1951

Honorable Clarence Evans
Chairman, State Tax Commission
Jefferson City, Missouri



Dear Sir:

This is to acknowledge receipt of your request for a legal opinion of this department which reads as follows:

"There seems to be some difference of opinion as to whether Billboards should be assessed as real estate or as personal tangible property.

"Will you kindly let us have your official opinion and oblige."

Section 137.010, RSMo 1949, relating to the definition of words and phrases found in the taxation and revenue laws reads as follows:

"The following words, terms and phrases when used in laws governing taxation and revenue in the state of Missouri shall have the meanings ascribed to them in this section, except when the context clearly indicates a different meaning:

"(1) 'Intangible personal property,' for the purpose of taxation, shall include all property other than real property and tangible personal property, as defined by this section;

"(2) 'Real property' includes land itself, whether laid out in town lots or otherwise, and all growing crops, buildings, structures, improvements and fixtures of whatever kind thereon, and all rights and privileges belonging or appertaining thereto;

"(3) 'Tangible personal property' includes every tangible thing being the subject of ownership or part ownership whether animate or inanimate, other than money, and not forming part or parcel of real property as herein defined. (L. 1945 p. 1799 Sec. 3, A. 1949 S.B. 1021)"

Section 137.015, relating to the classification of property for tax purposes, reads as follows:

"All property in Missouri shall be classified for tax purposes as follows: Class one, real property; class two, tangible personal property; class three, intangible personal property."

The opinion request does not give a detailed statement of the facts upon which it is based, and it is not known whether the writer was referring to those instances where the billboard is owned by one person or business concern and the land upon which it is placed is owned by a different person or business concern; or whether reference was made to those instances in which both land and billboard are the property of the same owner.

Since it appears that the landowner upon whose land a billboard is placed is not ordinarily the owner of the billboard, for the purposes of our discussion, we will assume that the opinion request was meant to refer to those instances where the billboard and real estate upon which it is placed are each owned by different persons.

Strange as it may seem, no Missouri decisions are to be found defining the term "billboard," and we find it necessary to turn to the decisions of other states for such a definition.

In the case of *Randall v. Atlanta Advertising Service*, 159 Ga. 217, it was held that a "billboard is an erection annexed to the land in the nature of a fence for the purpose of posting advertising, bills and posters."

Hon. Clarence Evans

Also in the case of *Cochrane v. McDermott Advertising Agency*, 6 Alabama App. 121, it was held that a billboard which is an erection annexed to land, in the nature of a fence, for the purpose of advertising, bills and posters, prima facie constitutes a part of the freehold.

(Underscoring ours.)

We are also unable to find any Missouri decisions which interpret the meaning of Section 137.010, particularly that part defining the term "real estate." While we are aware that the object of this statute is to provide a method of classifying property for tax purposes, and that the terms used shall have only that meaning ascribed to them in said section unless the context clearly denotes a different meaning, it appears that the term "real estate" as used therein is not given another or different meaning than is ordinarily given to it in legal terminology.

In view of the above definitions, particularly the latter, upon first thought it would seem that the definition of real property found in Section 137.010 would be broad enough to include the term "billboard." However, upon closer examination of the statute, it appears that a "billboard" cannot be classified as real property or as any right or privilege belonging to land, but that it more nearly meets the description of those things classified as "tangible personal property" under subsection 2 of the above section.

The distinction between real property and personal property, given in Section 137.010, does not appear to differ from the distinction between real and personal property under the English common law, and we quote from pages 1 and 2, of Tiedman on Real Property, as follows:

"In English common law, property is divided into two classes, real and personal. Real property is such as has the characteristic of immobility or permanency of location, as lands and rights issuing out of land. Personal property is every species of property which does not have above-mentioned characteristic * * *. All real property or things real, are said to be comprehended under the terms, lands, tenements, and hereditaments."

Section 3439, Mo. R. S. A. 1939, (Now Section 442.010 RSMo 1949) provides what the term "real estate" shall include and reads as follows:

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"The term 'real estate' as used herein, shall be construed as co-extensive in meaning with lands, tenements and hereditaments, and as embracing all chattels real."

This section appears to change the common law distinction between real and personal property, in that leasehold estates (which were personal property, under the common law system) are to be regarded as "an interest in real estate" under above statutory provisions. Section 936 of the 1899, Revised Statutes of Missouri is identical with that of Section 3439, supra, and in commenting on the legal effect of the former statute in the case of Orchard v. Store Company, 225 Mo. 413, at l. c. 437, the court made the following statement:

"The section of the statute quoted clearly says that for purposes of conveyance, a leasehold is to be considered as real estate. But does it mean more than that? Does it not mean that a leasehold is to be assigned or conveyed by a quitclaim or a warranty deed or mortgage, just as any other interest in land is to be conveyed? We think it means only that. It does not attempt to convert what was personal property at common law into real estate. * * *"

It appears that this quoted portion of the opinion is in clear and unmistakable language, and that further discussion of same is unnecessary, except that we wish to emphasize the statement that only for the purposes of conveyance is a leasehold to be considered real estate, and that this section does not attempt to convert what was personal property at common law into real estate.

Also in the case of National Bank of Kansas City v. Nee, 85 F. Supp. 840, it was held that the common law ruling of a leasehold being personal property, has not been changed in Missouri, by above statute.

At. l. c. 842, the court said:

"1. Section 3439, R. S. Mo. 1939, Mo. R.S.A., construes the term 'real estate' as follows: 'The term "real estate," as used herein, shall be construed as coextensive in meaning with lands, tenements and hereditaments, and as embracing all chattels real.' (Emphasis mine.)

"This statute did not change the common law rule that leasehold estates are personal property. It was so held in Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo.

414, 125 S.W. 486, loc. cit. 497, 499, and 500, 20 Ann. Cas. 1072; also Springfield Southwestern R. Co. v. Schweitzer, 246 Mo. 122, 151 S. W. 128, loc. cit. 131.

"It would follow from the above that all property strictly embraced within the leasehold would be 'chattels real' and would belong to the lessee."

From the foregoing it is our thought that the distinction between real and personal property under the English common law system is still recognized in Missouri, and that the classification given to property for the purposes of taxation found in Section 137.010, supra, is substantially the same as the common law classification of real and personal property.

Applying the common law rule, as well as that announced in the Kansas City case, it is our further thought that even though a billboard is annexed to real estate, it does not lose its distinctive characteristics as personal property and become a part, or any interest in the real estate, for the reason that it is usually annexed under the terms of a written lease agreement, with a right reserved in the lessee to remove the billboard at the end of the term of the lease. Since the parties do not intend that the billboard shall become a part, or any interest in the land itself, we know of no statutes applicable to such cases which would classify billboards as real estate contrary to the intention of the parties. Certainly the provisions of Section 137.010, would be no authority for such a classification, rather it appears that since the lease and leasehold property i.e., billboards are "chattels real," and chattels real are personal property, that a billboard could only be classified as tangible personal property under subsection (3) of said section. That in many instances billboards are owned by manufacturing or business corporations located in counties other than those in which the billboards have been erected. Such circumstances quite naturally raise the inquiry as to whether the billboards shall be assessed for taxation purposes in those counties in which they have been erected, or whether they shall be assessed to the corporations in those counties in which such corporations are located.

Having ruled above that billboards were personal property, and should be classified as tangible personal property for taxation purposes, we desire to call attention to Section 137.095, RSMo 1949, which provides those counties in which the tangible personal property of business and manufacturing corporations shall be assessed, and which does not require any further exposition on our part; said section reads as follows:

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"All tangible personal property of business and manufacturing corporations shall be taxable in the county in which such property may be situated on the first day of January of the year for which such taxes may be assessed, and every business or manufacturing corporation having or owing tangible personal property on the first day of January in each year, which shall, on said date, be situated in any other county than the one in which said corporation is located, shall make return thereof to the assessor of such county or township where situated, in the same manner as other tangible personal property is required by law to be returned."

In those instances in which billboards are the tangible personal property of an individual, such property shall be assessed in the county of the owner's residence, as provided by Section 137.090, RSMo 1949, and which reads as follows:

"All tangible personal property of whatever nature and character situate in a county other than the one in which the owner resides shall be assessed in the county where the owner resides, except tangible personal property, belonging to estates, which shall be assessed in the county in which the probate court has jurisdiction."

CONCLUSION

In view of the foregoing, it is the opinion of this department that a billboard erected upon the land of another, presumably under the terms of a lease-agreement, where the right to remove the billboard at the end of the term is usually reserved to the lessee, and in the absence of a contrary intention of the parties, the billboard does not become a part of the land, nor does the lessee acquire any right or privilege in real estate under the English common law. That under the common law, a lease and the leasehold property were chattels real, and even though annexed to land personal property did not lose its identity as such, under the circumstances. That the common law distinction between real and personal property is still recognized in Missouri, and a billboard annexed to real estate under the conditions mentioned, would be a chattel real or personal property, and not real property or any interest therein.

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It is the further opinion of this department that the classification of real and personal property for tax purposes given by Section 137.010, RSMo 1949, is substantially the same as the general classification of real and personal property under the common law, and that a lease, and leasehold property consisting of a billboard, are chattels real and personal property. The billboard being personal property should be classified as tangible personal property for tax purposes, under the provisions of said section.

In those instances in which a billboard is owned by a business or manufacturing corporation located in a county other than the one in which the billboard has been erected, such corporation shall, under the provisions of Section 137.095, RSMo 1949, make return thereon to the assessor of the county or township in which the billboard is situated, in the same manner as other tangible personal property is required by law to be returned.

In all other instances in which the billboard is the tangible personal property of an individual, such property shall be assessed in the county of the owner's residence, under the provisions of Section 137.090, RSMo 1949.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

PNC:hr

STATE TAX COMMISSION: The State Tax Commission is without authority to reassess real estate or to abate taxes on property which was duly assessed on January 1, 1951, and which, subsequent to that date, suffered a reduction in value due to floods in June and July of 1951.

September 6, 1951

9/17/51

Honorable Clarence Evans, Chairman
State Tax Commission of Missouri
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

"As a result of the recent terrible floods, we are having some requests for a re-assessment of real estate after the flood damage instead of the regular assessment as made on January 1, 1951. Also are having some requests for abatement of taxes.

"We are taking the position that under the law this Commission has no authority to reassess the property as of a later date than January 1, 1951, and that we have no authority to abate taxes.

"We would be greatly pleased to have your opinion as to whether the position we have taken in these matters is correct."

The authority of the State Tax Commission is set forth in Sections 138.380, 138.390, 138.400, 138.410, 138.420, 138.450, 138.460, 138.470, and 138.480, RSMo 1949.

Because of the length of these sections we will not quote them here. After an examination of them, we are unable to find any authority vested in the State Tax Commission to reassess real estate, under the circumstances set forth in your opinion request, or to abate taxes under these circumstances.

You have informed us orally that those persons who are requesting a reassessment of real estate, and those other persons who are requesting an abatement of taxes, were regu-

Honorable Clarence Evans

larly and properly assessed on January 1, 1951, in compliance with Section 137.075, RSMo 1949, which section states:

"Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

You have further informed us that these persons made no appeal to their county boards of equalization or to the State Tax Commission on the ground that such assessments were too high, or that they were made fraudulently, or on any other ground. There is no indication that these persons were dissatisfied with their assessments. On the contrary, it clearly appears that these people are appealing to the State Tax Commission solely in order to gain relief by reason of damage suffered to their property in the flood which occurred in late June and in July, 1951. In other words, they are seeking relief because of a drastic reduction in the value of their property, which reduction in value occurred nearly six months after the assessment of January 1, 1951.

Paragraph 2 of Section 138.460, RSMo 1949, provides that: "* * * All complaints shall be filed with the commission (State Tax Commission) not later than September thirtieth." (Words in parentheses, ours.)

Section 138.110, RSMo 1949, provides that:

"Complaints as to rulings of the county board of equalization in such counties shall be filed according to law with the state tax commission not later than August fifteenth of the year in which such ruling was made."

It is made quite clear, however, by the whole law pertaining to the State Tax Commission, that these appeals are to be from the January first assessment, and from the value of the assessed property as of that date.

Paragraph 4 of Section 138.420, RSMo 1949, states:

"Said commission (State Tax Commission) shall also have all power of original

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assessment of real and tangible property
in the possession of any assessing officer
on January first."

(Words in parentheses, ours.)

At this point we direct your attention to the case of
State ex rel. v. Edwards, 136 Mo. 360. The opinion in this
case was rendered December 15, 1896. On pages 368 and 369 of
that opinion the Court stated:

"The time for the assessment of property in
cities of the third class is governed by the
general law in respect to the assessment of
property for state and county taxation, under
which it is required to be made between the
first days of June and January. Sec. 7531.

* * * *

"In assessing property the owner is required
to list the property owned by him on the
first day of June of the year the assessment
is made, and the value is placed upon it by
the assessing officers as it was on that day.
The work of the assessor can not be done in
one day, and he is given from the first day
of June to the first day of January in which
time he is required to complete the assessment.
But the details of the assessment, when com-
pleted, relate back to the first day of June,
and must be taken as of that day, otherwise
serious complications might arise as is shown
in this case."

It will be observed from the quoted portion of the above
opinion that the assessment dates, at the time the Edwards
opinion was written, were from June first to January first.
These continued to be the assessment dates in Missouri until
Section 10950, R.S. Mo. 1939, was repealed by the Laws of
Missouri 1945 (page 1782). In lieu of repealed Section 10950,
supra, there was enacted Section 10 of House Substitute for
House Bill 469, which changed the assessment dates from June
first to January first, to January first to June first. How-
ever, it seems clear that the law as enunciated in the Edwards'
case, quoted above, would apply even though the assessment dates
have been changed, as noted above, since the Edwards' opinion
was written. Therefore, on the authority of the Edwards' case,
we conclude that assessments are to be based on the value of

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property on hand on January first of each year, which would preclude a reassessment based on a valuation at any date subsequent to January first.

In regard to the authority of the State Tax Commission, the Supreme Court of Missouri, in the case of Brinkerhoff-Faris Trust & Savings Company vs. Hill, 19 S.W. 2d 746, 1.c. 751, said:

"* * * The state tax commission is given general supervision over all the assessing officers of the state, with power to enforce its orders; it has all the powers of original assessment; it may receive complaints as to property liable to taxation that has not been assessed, or that has been fraudulently or improperly assessed, and apply the proper corrective measures; it can raise or lower the assessed valuation of real or personal property either in specific instances or by class; and it has authority, on the complaint of any taxpayer and after the various assessment rolls have been passed upon by the several boards of equalization, but before the delivery of the tax rolls to the proper officers for collection, to hold hearings for the purpose of determining whether any property subject to taxation has been omitted from the assessment rolls and whether any property thereon has been improperly valued, and to make such changes with respect thereto as shall be necessary to make the assessment rolls conform to the facts as found by them."

The above case was decided June 29, 1929, since which date there have been numerous revisions in the statutes relating to the State Tax Commission; however, none of these changes have substantially added to or detracted from the authority of the Commission, and certainly have not given it any authority in regard to the reassessment of real estate or the abatement of taxes which it did not have on the date that the Brinkerhoff opinion was written. It is our belief, therefore, that the summary of powers of the State Tax Commission which was made by the Missouri Supreme Court in 1929 is an accurate statement of the powers which the State Tax Commission possesses at this

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time, and it will be observed from the above summary that the State Tax Commission does not have the power to reassess real estate under the circumstances stated in your opinion request, nor to abate taxes under the circumstances.


CONCLUSION.

It is the opinion of this department that the State Tax Commission is without authority to reassess real estate or to abate taxes on property which was duly assessed on January 1, 1951, and which subsequent to that date, suffered a reduction in value due to floods in June and July of 1951.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

HPWab

CRIMINAL LAW) The state may take depositions in criminal cases under
) Art. I, Section 18(b), Constitution 1945, when it is
) not necessary to pay traveling expenses of defendant
) and his counsel. State may not take same if it is
) necessary to pay said traveling expenses until the
) Legislature makes provisions therefor.

March 22, 1951

Honorable Henry H. Fox, Jr.
Prosecuting Attorney
Jackson County
Kansas City, Missouri



Attention: Mr. Ben Leventhal,
Assistant Prosecuting Attorney

Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads:

"Will you please furnish me with the interpretation by your office of Article I, Bill of Rights, Section 18 of the Constitution of the State of Missouri, 1945, regarding the State taking depositions of witnesses?

"I would appreciate any circulars or printed matter showing discussions or debates in the State Legislature regarding this matter."

Section 18(b) of Article I of the Constitution of Missouri, 1945, provides:

"Upon a hearing and finding by the circuit court in any case wherein the accused is charged with a felony, that it is necessary to take the deposition of any witness within the state, other than defendant and spouse, in order to preserve the testimony, and on condition that the court make such orders as will fully protect the rights of personal confrontation and cross-examination of the witness by defendant, the state may take the deposition of such witness and either party may use the same at the trial,

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as in civil cases, provided there has been substantial compliance with such orders. The reasonable personal and traveling expenses of defendant and his counsel shall be paid by the state or county as provided by law."

The only question that calls for an interpretation of this section is, does the section require an act of the Legislature to put it into operation, or is the section self-executing, at least to the point where any rights or duties granted may be protected and enforced.

The general principles of law as to self-executing provisions in a constitution are stated in 11 Am. Jur., Section 71, Constitutional Law, page 688, as follows:

"Although a Constitution is usually a declaration of principles of the fundamental law, many of its provisions being only commands to the legislature to enact laws to carry out the purposes of the framers of the Constitution or mere restrictions upon the power of the legislature to pass laws, it is entirely within the power of those who establish and adopt the Constitution to make any of its provisions self-executing.

"A constitutional provision is self-executing where no legislation is necessary to give effect to it.

"A clear distinction exists between the questions as to whether a constitutional provision is mandatory or directory and whether it is self-executing or requires legislation in order to give it effect. A provision may be mandatory without being self-executing. The question has been said to be one of intention in every case."

Section 72, 11 Am. Jur., Constitutional Law, page 689, states in part:

"When the Federal Constitution and the first state Constitutions were formed, a Constitution was treated as establishing

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a mere outline of government providing for the different departments of the governmental machinery and securing certain fundamental and inalienable rights of citizens, but leaving all matters of administration and policy to the departments created by the Constitution. * * * During the last fifty years, state Constitutions have been generally drafted upon a different principle and have often become, in effect, extensive codes of laws intended to operate directly upon the people in a manner similar to that of statutory enactments. Accordingly, the presumption now is that all provisions of the Constitution are self-executing. * * * "

Section 74, 11 Am. Jun. Constitutional Law, page 691, states in part:

"One of the recognized rules is that a constitutional provision is not self-executing when it merely lays down general principles, but that it is self-executing if it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced, without the aid of a legislative enactment. * * * "

The Missouri courts have followed the foregoing principles of law:

In the case of State v. Kyle, 166 Mo. 287, l.c. 302, the court said:

"There are a number of provisions in the Constitution of this State, that are unquestionably self-executing, and require no legislation to put them in operation. The test in such cases is, can the Constitution as amended be enforced without the aid of legislation? 'The question in every case is whether the language of a constitutional provision is addressed to the courts or the Legislature; does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect?

Honorable Henry H. Fox, Jr.

This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed are fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts.' * * * "

The court has also held that part of an act may be self-executing and part not, and where possible, may be divided so that the self-executing part becomes operative. In the case of *State ex inf. Attorney General v. Duncan, et al.*, 265 Mo. 26, l.c. 49, the court said:

"But as stated above, neither authority nor argument can make clearer the patent conclusion that the first clause of section 9 of article 9 of the Constitution, supra, down to the first semicolon, is not self-executing, but that it requires legislation to carry it into effect; and that the remainder of this section is self-executing. No reason can be seen why such a condition is not permissible under the facts here; that is to say, why one clause of a given section of a constitution may not be self-executing and another clause or clauses of the same section not self-executing. Indeed, we have held that such a condition may exist without doing violence to the organic law. (*Sharp v. Biscuit Co.*, 179 Mo. 553.) The matter with which this section of the Constitution was dealing is divisible. * * * "

Also see *State v. O'Malley*, 117 S.W. (2d) 319, l.c. 323, citing the *Duncan* case.

Down to the last line Section 18(b) of Article I of the Constitution of Missouri, 1945, is clear and definite, its provisions do not need any kind of an enabling act by the Legislature to make them operative, and when the question of the traveling expenses of the defendant and his counsel does not enter into the taking of the deposition, it is our opinion the court may order the testimony taken. In a somewhat similar

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situation dealing with the establishment of magistrate courts where the Legislature did not provide a salary for the judge, the Supreme Court said in the case of State ex rel. Randolph County v. Walden, 206 S.W. (2d) 979, l.c. 985:

" * * * Certainly nothing in any of these constitutional provisions can be construed as suspending the operation of magistrate courts until the General Assembly had acted-- and much less can they be thought to sanction the making of structural changes in these courts, as Section 1, Laws Mo. 1945, p. 767 has done, by nullifying the provision in Section 18, Article V of the Constitution, that the number of magistrates may be increased by two in any county, and substituting a provision that it can be done only in counties of more than 30,000 inhabitants. * * * "

"Relator further argues that Section 1, Laws Mo. 1945, p. 768 leaves the magistrate courts hamstrung because in the last sentence it only provides for the salaries of magistrates in counties of 30,000 inhabitants or more, and thereby leaves magistrates in counties of less population unprovided for. This does not by any means follow. The mere fact that the Legislature may fail to provide a salary for a court does not destroy the court as such."

We cite the Walden case to support our contention that depositions may be taken under the provisions of Section 18(b) when the traveling expense matter does not enter into the taking.

The Legislature has not made any provision to pay the traveling expense of the defendant and his counsel, and until they do, it is our opinion the act is inoperative when travel would be necessary and the payment of the travel expenses necessary, because it would deny the defendant his rights of confrontation and cross-examination.

The courts have held that in order to pay any such fees or cost there must be statutory authority authorizing same. The Supreme Court said in the case of Cramer v. Smith, et al., 168 S.W. (2d) 1039, l.c. 1040:

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"At common law costs as such in a criminal case were unknown. As a consequence it is the rule as well in criminal as in civil cases that the recovery and allowance of costs rests entirely on statutory provisions--that no right to or liability for costs exists in the absence of statutory authorization. Such statutes are penal in their nature, and are to be strictly construed." 20 C.J.S., Costs, § 435, p. 677."

In the 1945 session of the Missouri State Legislature, House Bill No. 575 was introduced covering this situation, but it was never passed. There is no record of any debates or discussions.

CONCLUSION

It is the opinion of this department that the state may take depositions under the provisions of Section 18(b) of Article I of the Constitution of Missouri, 1945, when the provision allowing defendant and his counsel traveling expenses does not enter into the taking thereof, and it is our further opinion that until the Legislature enacts a law providing for the payment of the traveling expenses of defendant and his counsel the entire act (Section 18(b)) would be inoperative when travel would be necessary in the taking of the depositions.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

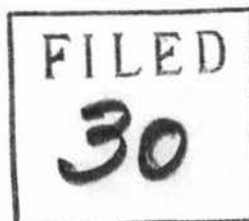
J. E. TAYLOR
Attorney General

WBD:VLM

PROSECUTING ATTORNEYS: Prosecuting attorney entitled to five dollars upon conviction of a misdemeanor
MAGISTRATE COURTS: in magistrate court, which is to be assessed as costs against the defendant.

November 7, 1951

11-8-51



Honorable Henry H. Fox, Jr.
Prosecuting Attorney
Jackson County
Kansas City, Missouri

Dear Mr. Fox:

This department is in receipt of your request for an official opinion, which reads as follows:

"A large number of vehicular cases, mostly careless driving and in the misdemeanor classification, are now being filed by the sheriff's office and the state patrol.

"Some discussion has arisen among the magistrates as to the exact costs and fines that should be collected, either in the event of a plea of guilty or a trial in which the defendant is found guilty.

"We have been insisting that the court in each instance collect a prosecuting fee of \$5.00 which is turned over to the county treasurer. Will you please advise if this is in conformity with the present law."

Section 56.310, RSMo 1949, provides, in part, as follows:

"Prosecuting attorneys shall be allowed fees as follows, * * * for the conviction of every defendant * * * before a magistrate court, upon information, when the punishment assessed by the * * * jury or magistrate shall be fine or imprisonment in the county jail, or by both such fine and imprisonment, five dollars; * * *"

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The statute is plain in its requirement that the prosecuting attorney is entitled to a fee of five dollars upon every conviction in a magistrate court.

It has long been the rule in this state that the fee of the prosecuting attorney is to be taxed as costs and paid by the defendant. State ex rel. Kemp ex inf. Hudgins v. Hannibal and St. Joseph Railroad Co., 30 Mo. App. 494; Inre Murphy, 22 Mo. App. 476.

Section 56.320, RSMo 1949, provides, in part, as follows:

"In all counties of class one in this state the salary of the prosecuting attorney in such counties shall be in lieu of all fees for criminal cases, but the fees of the prosecuting attorney shall continue to be taxed as heretofore, and, when collected, shall be turned into the treasury of said county. * * *"

Jackson County is a class one county, and the above statute requires the fee of the prosecuting attorney, when collected from the defendant, to be turned into the Treasurer of Jackson County.

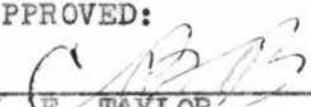
CONCLUSION

It is, therefore, the opinion of this department that the Prosecuting Attorney of Jackson County is entitled to a fee of five dollars when a defendant is convicted in a magistrate court of a misdemeanor and a fine or imprisonment in a county jail, or both, are assessed. This fee is to be taxed as costs against the defendant and, when collected, shall be turned into the Jackson County Treasurer.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

AMO'K:ml

SCHOOLS: Board of Regents of Northwest Missouri State College authorized to make settlement for damages incurred to college property and receive payment of money resulting from said settlement.



November 29, 1951

11-30-51

Mr. M. E. Ford, President
Board of Regents
Northwest Missouri State College
Maryville, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department which in part reads:

"It has undoubtedly been called to your attention that the Northwest Missouri State College suffered an extensive explosion and fire damage to the women's dormitory building on the campus last spring. The loss was caused by failure of a gas tank owned by the St. Joseph Light and Power Company located near the college premises and approximately 150 feet from the building which was damaged.

"The St. Joseph Light and Power Company and its indemnity insurance carrier have admitted responsibility for the damage, and we are negotiating for a settlement on the loss. Notwithstanding our assurances that the Board of Regents of the College, under the constitution and statutes, is a public corporation for educational purposes, has title to the property which was damaged, and by virtue of its management and control is the proper entity to settle the loss and receive the proceeds of settlement, (which assurances are actually acceptable to the St. Joseph Light and Power Company), its insurance

Mr. M. E. Ford

carrier which will provide most if not all the funds for settlement of the claim, has asked that we procure an official opinion from your office to the following effect:

"That the Board of Regents of the College is a public corporate entity for educational purposes and has full authority to make settlement of the board's claim for damage to college property and receive and receipt for proceeds of any settlement negotiated by the Board."

Regarding the powers of the Board of Regents of the Northwest Missouri State College, Section 174.040, RSMo 1949, provides as follows:

"The boards of regents shall be known respectively as 'The Board of Regents for the Northeast Missouri Teachers State College,' 'The Board of Regents for the Central Missouri State College,' 'The Board of Regents for the Southeast Missouri State College,' 'The Board of Regents for the Southwest Missouri State College,' and 'The Board of Regents for the Northwest Missouri State Teachers College'; and by their respective names they shall have perpetual succession, with power to sue and be sued, complain and defend in all courts, to take, purchase, and hold real estate, and sell and convey or otherwise dispose of the same, and to make and use a common seal and to alter the same."

It is further provided in Section 174.120, RSMo 1949:

"Each state teachers college shall be under the general control and management of its board of regents, * * *."

In connection with the powers conferred upon the Board of Regents by Section 174.040, supra, the Supreme Court of Missouri in State ex rel. Thompson v. Board of Regents for

Mr. M. E. Ford

Northeast Missouri State Teachers College, 264 S.W. 698, construing a similar section appearing in the 1919 Revised Statutes said the following at l.c. 701:

"Under section 11491, the board of regents is empowered to sue and be sued, to take, purchase, and hold real estate, and to sell and otherwise disposed of same. This section invests the board with powers akin to those of a corporation, and within the limits defined recognizes the board as a legal entity, without in any wise lessening the state's sovereignty.
* * *

In the above case the court has recognized the board of regents of a state college as being a legal entity with powers akin to those of corporations.

By statute the board is invested with the power to sue and be sued. In construing the term "sue and be sued" the Supreme Court of the United States in the case of Reconstruction Finance Corporation v. Menihan Corporation, 312 U. S. 81, 61 S. Ct. 485 said the following at S. Ct. l.c. 487:

"* * *We apply the farther principle that the words 'sue and be sued' normally include the natural and appropriate incidents of legal proceedings. * * *

Under the above definition it is our thought that the Board of Regents of the Northwest Missouri State College, if such action had been required, could have instituted necessary legal proceedings to recover the damages incurred by the college as a result of the aforementioned explosion and fire, and as a natural and appropriate incident to such legal proceedings could have received the amount of damages awarded by the court upon a judgment being rendered favorable to the college. In other words, we believe that receiving payment of damages would be included in the authority to institute legal proceedings.

It is our understanding that in the situation which you have presented payment of damages incurred by the college resulting from the fire and explosion will be made without there being any legal proceedings instituted to recover same.

Mr. M. E. Ford

Such being the case we believe it would logically follow that if the Board of Regents would be empowered to institute legal proceedings to recover said damages and to receive payment of same after a favorable judgment the Board would certainly have the power to receive payment of damages resulting from a settlement being made.

We might further point out that the Supreme Court of Missouri has held that an agency of the state having power to bring suit is also authorized to settle claims and accept satisfaction of the amount claimed. In the case of Iron Mountain and Southern Railway Company v. Anthony, 73 Mo. 431, l.c. 434, the court said:

"The power to sue implies the power to accept satisfaction of the demand sued for, whether the precise amount demanded or less."

Again in the more recent case of State v. Smith, 201 S.W. (2d) 153, the court sustained the rule as above stated where at l.c. 157 it said:

"Respondent contends that since the Sales Tax Act gives him the power to sue for the tax, it necessarily gives him the implied power to settle the tax, except where he is prohibited from doing so by law. He, therefore, contends that he has the power to compromise interest and penalties. We think respondent's contention must be sustained.* * *"

We believe that the above decisions would be applicable in sustaining the authority of the Board of Regents in question to make settlement of the instant claim and receive payment of the money damages negotiated by the settlement.

It also appears that the legislature has contemplated the Board of Regents acting for and on behalf of the college might receive moneys from other sources. In this connection Section 174.170, RSMo 1949, provides:

"The president of each board shall make an annual report to the state board of education, in the month of August in each year, of all receipts of moneys from appropriations, incidental fees, and all

Mr. M. E. Ford

other sources, and the disbursements thereof, and for what purposes, and the condition of said college."

Further Section 174.180, RSMo 1949, in part provides:

"* * * The treasurer of each board shall also make and furnish to the state board of education in the month of August of each year, an abstract which shall contain a full account of all moneys received and disbursed by his college during the preceding year, stating from what source received and on what account paid out, and the amount paid to each professor, teacher or other officer of the college; and said treasurer shall every two years report to the general assembly, under oath, an itemized statement of all receipts and expenditures for the two calendar years preceding, showing minutely all disbursements of money received from the state or other sources, and said college shall not be entitled to any appropriation unless such statement is so made."

The Supreme Court has also recognized that a state college might come into possession of funds other than money received from state appropriation. Again in *State ex rel. Thompson v. Board of Regents for Northeast Missouri State Teachers College*, supra, the court at l.c. 701 said:

"The correctness of our construction of section 11505 is further attested by section 11506, which requires the treasurer of the board to make an itemized statement to the Legislature of the receipts and expenditures of the board, showing all disbursements of money received from the state and from other sources. In harmony with the construction given to the foregoing sections is section 11508, which requires the board at its annual meeting to set apart 'all moneys derived from incidental or other fees paid by students,' etc., thus clearly recognizing that the college has funds within its control which were never in the state treasury nor appropriated by the Legislature."

Mr. M. E. Ford

Consequently we believe it is evident that the Board of Regents of a state college would be authorized to receive money from other sources such as that to be paid in the instant case negotiated by settlement to compensate for the damages incurred by the college.


CONCLUSION

In the premises it is the opinion of this department that the Board of Regents of the Northwest Missouri State College would be authorized to make settlement of the claim for damages to college property and receive payment of money negotiated by the Board in making the settlement.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

RFT:ba

CIRCUIT CLERK: County Court cannot legally pay Circuit Clerk mileage
MILEAGE FEES: from the county seat, Carthage, Missouri to Joplin,
Missouri, when he attends court being held at Joplin,
Missouri, under Section 483.315, RSMo 1949.

June 22, 1951

Mr. Gene Frost
Prosecuting Attorney
Carthage, Missouri



Dear Sir:

This will acknowledge receipt of your request for an official opinion of this department. The pertinent part of this request is as follows:

"Jasper County has two divisions of court and two places of holding court within the county, at Carthage and Joplin. The County Court wishes to be advised whether or not they can legally pay the Circuit Clerk mileage from the county seat, Carthage, Missouri, to Joplin, Missouri, when he attends court that is being held at Joplin, Missouri."

Section 483.315, RSMo 1949, reads as follows:

"The clerk of the circuit court, in all counties of the second class, shall receive as compensation for his services, the sum of four thousand dollars per annum, to be paid in twelve equal monthly installments by the county on warrants drawn on the county treasury. He shall also be allowed to retain, in addition to said annual salary, all fees earned by him in cases of change of venue from other counties."

This statute we believe clearly and distinctly fixes the annual salary of, and fees to be retained by, the Circuit Clerk in class two counties, Jasper County being in class two.

The rule regarding salary, fees, mileage, etc., of public officers is that, absent any statute authorizing their payment,

Mr Gene Frost

such compensation cannot be paid the officer seeking it.

A thorough search of the Missouri Revised Statutes, 1949, does not disclose any other statute which would authorize the payment of mileage by the county court to the Circuit Clerk of Jasper County for trips between Carthage and Joplin, Missouri, in attendance upon court when the same is being held in Joplin.

In Nodaway County v. Kidder, 344 Mo. 795, 129 S.W.(2d) 857, a leading case in this state with regard to collection of compensation and fees by a public officer, this being one wherein a judge of the county court collected daily compensation and mileage allegedly upon county business, the greater part of which was denied the appellant, our Supreme Court in its opinion at page 860 said:

* * * * *


"(8) It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackman, 305 Mo. 342, 262 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645."

CONCLUSION

It is, therefore, the opinion of this department that Section 483.315, supra, is the only statute authorizing the compensation of the Circuit Clerk of Jasper County as such. That the County Court cannot legally pay the Circuit Clerk mileage from the county seat, Carthage, Missouri to Joplin, Missouri, when he attends court being held at Joplin, Missouri.

Respectfully submitted,

APPROVED:


J. E. TAYLOR
Attorney General

A. BERTRAM ELAM
Assistant Attorney General

ABE:mw

COUNTY TREASURER:
COST IN CRIMINAL CASES:
FEES:

County treasurer to turn over to state treasury or county revenue fund all uncalled for fees at the end of the next term of court following receipt of the criminal cost fee bills.

April 5, 1951

4-5-51



Honorable Meredith Garten
State Senator
Capitol Building
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent opinion request which reads in part as follows:

"The new county treasurer at Mt. Vernon in Lawrence County wants your opinion about what disposition to make of witness and other criminal fees that have accumulated during the years and are uncalled for. * * *"

Section 550.300, RSMo 1949, provides:

"At the end of each term of court after the receipt of each criminal cost fee bill from either the state auditor or the county clerk, the treasurer shall strike a balance of the same, and shall turn over the amounts collected on account of the various items of indebtedness herein mentioned to the various funds to which they belong. And all uncalled for fees paid by the state shall be promptly transmitted to the state collector of revenue who shall deposit the same in the state treasury, and those paid by the county shall be turned over to the credit of the county revenue fund."

This section provides for the disposition of uncalled for fees arising in criminal matters and provides that this disposition shall be made "at the end of each term of court after

Honorable Meredith Garten

receipt of each criminal cost fee bill." Therefore, while Section 50.500, RSMo 1949, provides that uncalled for fees arising in civil matters are to be disposed of at the end of one year after receiving such, the legislature has seen fit to provide that uncalled for fees arising in criminal matters be disposed of at the end of the next full term of court following receipt of same by the county treasurer.

CONCLUSION

It is therefore the opinion of this department that the county treasurer, at the end of the next full term of court following receipt of the criminal cost fee bills, shall transmit to the state collector of revenue all uncalled for fees arising in criminal matters paid by the state and turn over to the credit of the county revenue fund all such fees paid by the county.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

PUBLIC SERVICE COMMISSION:
CERTIFICATE OF CONVENIENCE
AND NECESSITY:

A certificate of convenience and necessity is prerequisite for one to operate as a motor carrier of passengers for hire; "taxicabs" operating within "suburban territory" exempt.

March 19, 1951.

Hon. J. R. Gideon,
Prosecuting Attorney,
Forsyth, Missouri.

3-23-51

FILED
33

Dear Sir:

This will acknowledge receipt of your request for an opinion from this office on a question which you present as follows:

"For the past several years in Taney County, we have had a number of persons (especially during tourist seasons), that use their private automobiles to transport persons for hire. These private operators use the public highways, some of which routes, have licensed buses operating over them. These private operators have no city, state or government licenses authorizing them to so operate their said automobiles for hire. These offenders make trips, when a load can be produced, and travel to points 25 or more miles from starting point, and traverse state highways covered by licensed operators for transporting persons for hire.

"These private operators also advertise their services.

"In your opinion, are persons operating their private automobiles for the transportation of persons for hire, as above described, required to procure a license to so operate? If a license is required what kind of license should be procured?"

At our request you furnished us a more detailed account of the manner of operation of these motor vehicles as follows:

"Your letter under date of Dec. 5th, 1950, relative persons operating automobiles for hire without obtaining a license authorizing such operation, has just reached my desk.

"For the past several years a number of persons have been operating out of Rockaway Beach, Branson and Hollister using their private automobiles. These

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persons advertise trips to points of interest in this immediate section. These operators do not advertise any regular schedule. When a load is made up operator takes off. They usually go via Reeds Springs and on to Fairy Cave, Marble Cave and then back thru Shepherd of the Hills Country, then on thru Branson to starting point. Other times the above route is traveled in reverse order.

"These trips are not confined to the points above mentioned, but include other points to the east and south. I have heard of one operator of making trips to Eureka Springs, Ark.

"I understand one operator located a Rockaway Beach, has a license to operate on a irregular route covering the caves and section above mentioned. I have not verified that a license has been issued for such irregular route, but I was informed that one A. U. Blansit has such a License.

"All the others mentioned above operate for about three months each year during tourist season, and call at hotels and tourist camps soliciting business.

"The above covers about all the information available except the fact that most or all of these operators do not have a license of any kind, not even a taxi license."

Section 390.020, RSMo. 1949, defines the terms used in the regulation of motor carriers as follows:

"1. The term 'motor vehicle,' when used in sections 390.010 to 390.170, means any automobile, automobile truck, motor bus, truck, bus, or any other self-propelled vehicle not operated or driven upon fixed rails or tracks.

"2. The term 'motor carrier,' when used in said sections, means any person, firm, partnership, association, joint stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons or property or both or of providing

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or furnishing such transportation service, for hire as a common carrier; provided, however, said sections shall not be so construed as to apply to motor vehicles used in the transportation of passengers or property for hire, operating over and along regular routes within any municipal corporation or a municipal corporation and the suburban territory adjacent thereto, forming a part of transportation system within such municipal corporation or such municipal corporation and adjacent suburban territory, where the major part of such system is within the limits of such municipal corporation; and provided further, said sections shall not be so construed as to apply to motor vehicles operated between the State of Missouri and an adjoining state when the operations of such motor vehicles within the state of Missouri are limited exclusively to a municipality and its suburban territory as herein defined.

"4. The term 'taxicab,' when used in said sections, shall mean every motor vehicle designated and/or constructed to accommodate and transport passengers, not more than five in number, exclusive of the driver and fitted with taximeters and/or using or having some other device, method or system, to indicate and determine the passenger fare charged for distance traveled, and the principal operations of which taxicabs are confined to the area within the corporate limits of cities of the state and suburban territory as herein defined.

"6. The term 'suburban territory,' when used in said sections, means that territory extending one mile beyond the corporate limits of any municipality in this state and one mile additional for each fifty thousand population or portion thereof; provided, that when more than one municipality is contained within the limits of any such territory so described, motor carriers operating in and out of any such municipalities within said territory shall be permitted to operate anywhere within the limits of the larger territory so described.

"7. The term 'public highway,' when used in said sections, means every public street, alley, road, highway, or thoroughfare of every kind in this state used by the public, whether actually dedicated to the public and accepted by the proper authorities or otherwise.

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"8. The term 'regular route,' when used in said sections, means that portion of the public highway over which a motor carrier usually or ordinarily operates or provides motor transportation service.

"9. The term 'irregular route,' when used in said sections, means that portion of the public highways over which a regular route has not been established."

Clearly the definition of "motor carrier" quoted as paragraph 2 above encompasses the motor vehicles described in your letter and their operation for hire on "call and demand" service over irregular routes.

The vehicles are just as clearly not "taxicabs" as defined above since they operate outside a "suburban territory" and are not entitled to exemption provided for taxicabs from the provisions of Chapter 390, RSMo. 1949. Since these persons are operating motor vehicles for hire and are clearly "motor carriers" and are not exempt as "taxicabs" they are subject to the regulation and license fees imposed by Chapter 390, RSMo. 1949.

In the case of State ex rel. Crown Coach Co. v. Public Service Commission, 185 S.W. 2d. 347, the court had to determine whether certain passenger cars being operated as carriers for hire were taxicabs. The court at l.c. 357 said:

"It is evident that under Section 5720(d), R. S. Mo. 1939, motor vehicles of the type therein described and used for hire as common carriers are either 'taxicabs' or they are not 'taxicabs', depending on the location of their principal operations. Under the evidence in this case the motor vehicles in question were common carriers for hire. See State ex rel. Anderson v. Witthaus, 340 Mo. 1004, 102 S.W. 2d 99. To determine the jurisdiction, if any, of the Public Service Commission over such vehicles of the type described, when used for hire as common carriers, as in the instant case, the statutory test is whether the 'principal operations' of the same are 'confined to the area within the corporate limits of cities of the state and suburban territory as herein defined.' If the facts show all the elements of such exemption to exist, then no part of Article 8, Chapter 35, R.S. Mo. 1939, applies to such carriers and the Public Service Commission has no power of jurisdiction over them. If the facts show any element of exemption lacking, then such vehicles are within the

purview of Section 5720(b) and 5725, which statutes and all other applicable provisions of said article affect such vehicles, and the jurisdiction of the Public Service Commission would obtain."

Section 390.060 requires any motor carrier operating as a common carrier to obtain from the Public Service Commission a certificate declaring that public convenience and necessity will be promoted by such operation. Said section reads in part as follows:

"I. It is hereby declared unlawful for any motor carrier to operate or furnish service as a common carrier within this state without first having obtained from the commission a certificate declaring that public convenience and necessity will be promoted by such operation. The commission upon the filing of a petition for a certificate of convenience and necessity shall within a reasonable time fix a time and place for hearing thereon. The commission shall cause a copy of such petition and notice of hearing thereon to be served at least ten days before the hearing upon the officers or owners of every common carrier that is operating or has applied for a certificate of convenience and necessity to operate in the territory proposed to be served by the applicant, and on the city clerk of any city into or through which said motor carrier may desire to operate, and any such common carrier or city is hereby declared to be an interested party to said proceeding and may offer testimony for or against the granting of such certificate, and any other person or persons who might in the opinion of the commission, be properly interested in or affected by the issuance of said certificate, be by the commissioner made a party, and may offer testimony for or against the granting of such certificate. If the commission shall find from the evidence that public convenience and necessity will be promoted by the creation of the service proposed, or any part thereof, as the commission shall determine, a certificate therefor shall be issued. In determining whether or not a certificate of convenience and necessity should be issued, the commission shall give reasonable consideration to the transportation service being furnished by any railroad, street railroad or motor carrier, and shall give due consideration to the likelihood of the proposed service being permanent and continuous

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throughout twelve months of the year, and the effect which such proposed transportation service may have upon other transportation service being rendered; provided, however, no vested right shall accrue to any certificate of convenience and necessity; and provided further, that the issuance of a certificate of convenience and necessity to one carrier shall not prohibit the granting of such certificate to another carrier over the same route if in the opinion of the commission the public convenience and necessity will be promoted by so doing.

"4. The commission shall adopt rules prescribing the manner and form in which motor carriers shall apply for certificates and permits required by sections 390.010 to 390.170. Among other rules adopted, there shall be rules as follows:

"(1) Application shall be in writing;

"(2) Shall contain full information concerning the ownership, financial condition, equipment to be used, and the physical property of the applicant;

"(3) The complete route over which the applicant desires to operate or the territory which applicant desires to serve;

"(4) The proposed rates, schedule, or schedules, or time cards of the applicant."

The rates for such license are provided by section 390.110 as follows:

"1. In addition to the regular registration license fee imposed on all motor vehicles in this state, and its personal property tax, every motor carrier, except as provided in section 390.030 shall, at the time of the issuance of a certificate of convenience and necessity and/or an interstate permit, and annually thereafter, on or between January first and January fifteenth of each calendar year, pay to the state of Missouri the annual license fee, as set out in sections 390.010 to 390.170. All such fees levied upon the issuance of a license to any motor carrier for any

motor vehicle hereunder shall be reckoned from the beginning of the quarter in which such license was issued; provided, however, that no motor vehicle coming within the provisions of said section shall be used or licensed which has a greater dimension or weight than is now or may hereafter be provided by law.

"2. In all cases where the mileage of any route covered by any certificate of convenience and necessity and/or an interstate permit issued under the provisions of sections 390.010 to 390.170 shall be in question, the public service commission shall by order determine such question and the order of the public service commission in such cases shall be final. For the purpose of determining the mileage of any such route, the certificate of the state highway commission, with respect to state highways, the county engineer, with respect to county or other highways not constituting a part of the state highway system, or of the streets of any municipal corporation, and in the case of streets in any municipal corporation, the certificate of any city engineer or mayor shall be accepted by the public service commission as conclusive evidence; provided, that where a motor carrier is operating within this and an adjoining state and the total mileage of said route in Missouri is ten miles or less, the license fee shall be one-third of the license fee set out in this chapter; provided further, that where a motor carrier is operating a route in this state, the total mileage of which is not greater than twenty miles, the license fee shall be one-half of the license fee herein set out.

"3. In the case of emergency or usual temporary demand for transportation, the license fee or additional motor vehicle for limited periods shall be fixed by the commission in such reasonable amount as may be prescribed by general or temporary order.

"4. The commission, upon the issuance of a license for any vehicle, as defined in sections 390.010 to 390.170, shall notify the director of revenue who shall receive the license fee for such vehicle; and immediately deposit the same with the state treasurer

in the state highway department fund.

"5. For each motor vehicle operating under a certificate of convenience and necessity or interstate permit as a passenger carrying vehicle, the sum of ten dollars per passenger seat.

"6. In computing the annual license fee on each motor vehicle, trailer or semi-trailer, operating under a certificate of convenience and necessity or interstate permit as a freight carrying vehicle, the vehicle shall be rated on the manufacturer's rated load capacity or the actual weight carrying capacity of the vehicle, which capacity shall be determined by the public service commission at the time a certificate of convenience and necessity or interstate permit is issued.

"8. Any motor carrier who shall use said highways in the transportation of persons or property or both as a common carrier without securing and having such interstate permit or certificate of convenience and necessity, and without paying the fees and filing the bond or insurance policy as provided in sections 390.010 to 390.170 shall forfeit and pay to the state of Missouri for deposit in the state highway department fund, the sum of five hundred dollars for each day such business is so conducted, to be recovered by civil action in the name of the director of revenue of the state of Missouri, instituted by summons or by attachment against their property in any county in this state wherein such property may be found.

"9. A motor carrier may elect to have described on his or its annual license card of any regularly licensed motor vehicle, trailer or semitrailer, not more than two emergency vehicles of weight carrying capacity not greater than that of the regularly licensed vehicle upon the payment by such motor carrier of an annual fee of five dollars for each alternate emergency vehicle described on said annual license card. Only one of such three vehicles as shown on the annual license card may be operated in the state at any one time; provided, however, the commission may on application, when a licensed motor vehicle has been destroyed or permanently replaced by another motor vehicle of the same seating capacity or less, or same tonnage capacity or less, transfer said annual license; in cases where the substituted

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vehicle is of larger seating or tonnage capacity, the applicant must pay an additional sum equivalent to the difference between the annual license fee for the original motor vehicle and the annual license fee for the substituted motor vehicle; provided, however, where a motor carrier uses a tractor for pulling trailers or semitrailers said motor carrier may elect to have described on his or its annual license card either the tractor, trailer, or semitrailer. In the event the motor carrier elects to license the tractor the annual license fee shall be computed upon the greatest weight carrying capacity of any trailer or semitrailer proposed to be operated in connection with said tractor.

"10. Eighty-five per cent of the registration fees paid by a motor carrier under section 301.060, RSMo 1949, on a commercial motor vehicle, shall be credited against the fees for the corresponding period required on any one vehicle of such motor carrier as provided in section 390.010 to 390.170; provided, however, such credit shall not apply on alternate or emergency vehicles."

Application for a certificate of public convenience and necessity for the operation of motor carriers for hire for carrying passengers on call and demand service over irregular routes should be made to the Public Service Commission.

For violation of or failure to comply with the provisions of sections 390.010 to 390.170 a penalty is fixed by section 390.170 in the following language:

"Every owner, officer, agent or employee of any motor carrier, contract hauler, and every other person, who violates or fails to comply with or who procures, aids or abets in the violation of any provision of sections 390.010 to 390.170, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement of the commission, and who procures, aids or abets any corporation or person in his failure to obey, observe, or comply with any such order, decision, rule, direction, demand or regulation thereof shall be guilty of a misdemeanor and punishable by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year or by both such fine and imprisonment."

Hon. J. R. Gideon,

CONCLUSION.

Persons operating motor vehicles to transport persons for hire over irregular routes, rendering call and demand service outside suburban territory, are required to apply to the Public Service Commission for a certificate of convenience and necessity as a motor carrier and if such certificate is granted pay the license fee required for the type of operation in which such carriers engage.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:

A handwritten signature in dark ink, appearing to be 'J. E. Taylor', written over a horizontal line.

J. E. TAYLOR
Attorney-General

JEM/ld

ADMINISTRATION:
INHERITANCE TAX
REFUNDS, PROCEDURE:
STATUTE OF LIMITATIONS:

Arkansas Court judgment obtained by Missouri executor binding; court lacked jurisdiction of inheritance tax matters under Missouri statutes. Such jurisdiction in Probate Court of Livingston County, Mo., where administration was pending. Court could find erroneous tax payment under Sec. 145.150 but lacks power to order State Treasurer to make refund. Refunds to be ~~made by~~ Director of Revenue ~~under~~ under Sec. 145.250. Right to refund accrued when it was settled by probate court tax was erroneous. Statute of Limitations runs from such time.

May 18, 1951



Mr. C. L. Gillilan, Assistant Supervisor
Inheritance Tax Unit
Department of Revenue
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for an official opinion of this department, which reads as follows:

"I am giving you a brief outline of the facts revealed by documents contained in our file in the above estate, and I am enclosing correspondence indicating the Department's position relative to a refund of transfer or inheritance tax claimed to have been erroneously assessed and paid in this estate.

"The inheritance tax as originally assessed amounted to \$6,610.07, 97½% of which, \$6,444.82, was paid to R. W. Winn, State Treasurer, on June 3, 1946. \$6,000.00 of the amount was assessed on a purported gift to one Lawren W. Baker some three weeks prior to decedent's death and was paid by Baker to the executor of the estate. 97½% of this assessment, or \$5,850.00, was included in the executor's remittance to the State Treasurer.

"On April 27, 1948 a suit was filed by the Missouri executor in the Pulaski Chancery Court of Arkansas against Baker, he having moved to that State, seeking recovery of the purported gift upon which transfer tax has been paid to this State. The Arkansas Supreme Court mandate affirming judgment against Baker and in favor of plaintiff is dated December 5, 1949.

Mr. C. L. Gillilan

"On April 10, 1950 the executor filed a petition in the Probate Court of Livingston County seeking a redetermination of inheritance tax liability on the ground that the \$6,000.00 tax paid on the purported gift to Baker had been erroneously assessed and paid, and that the Probate Court make proper certification to the State Director of Revenue authorizing refund of the amount claimed to have been overpaid.

"The Probate Court, in response to the petition, appointed Mr. Don Chapman as inheritance tax appraiser to reappraise the estate for a determination of tax. On June 19, 1950, before the appraiser had submitted his reappraisal, the Probate Court, on petition of the executor, entered an order directing a refund of \$5,850.00, a copy of which order was certified to this Department on June 20, 1950.

"Later, on February 7, 1951, the appraiser, Mr. Chapman, who was appointed on April 10, 1950, filed his report, reappraising the estate for inheritance tax purposes. This reappraisal showed a recovery in the net amount of \$11,741.70 under the Arkansas judgment and the total tax fixed by this appraisal was \$1,314.17 which would mean an over-assessment in the amount of \$5,295.00 in the original report. The reappraisal was approved by the Probate Court and certified to this Department on the 22nd day of February, 1951, but our file contains no copy of a Probate Court order bearing that date and authorizing a refund in the amount of \$5,295.00.

"The legal questions involved and on which the Department requests an opinion are as follows:

"1) What is the obligation of the Director of Revenue of the State of Missouri under the Arkansas Supreme Court mandate as it affects imposition of a Missouri transfer or inheritance tax?

Mr. C. L. Gillilan

"2) What is the obligation of the Director of Revenue in regard to a Probate Court order directing the refund of transfer or inheritance tax?

"3) Under the provisions of Section 145.250, Revised Statutes 1949, application for refund must be made within two years from date of the accrual of the right to such refund. Does Statute of Limitations run from the date of the payment of this tax, June 3, 1946; the date of the Arkansas Supreme Court mandate, December 5, 1949; the date of the Livingston County Probate Court order of reappraisal, April 10, 1950; the date the Livingston County Probate Court ordered a refund in the amount of \$5,850, June 19, 1950; or the date reappraisal, finding a tax in the amount of \$1,314.57, was filed?

"This reappraisal was objected to by the Department but no formal exceptions were filed in Probate Court. Our complete file is available if further information is desired."

Your first question is, "What is the obligation of the Director of Revenue of the State of Missouri under the Arkansas Supreme Court mandate as it affects the imposition of a Missouri transfer or inheritance tax?"

The mandate of the Arkansas Supreme Court rendered on December 5, 1949, was conclusive as to all questions raised or that might legally have been raised in the trial of the case. This judgment was, and is entitled to full faith and credit under the provisions of Section 1, Article 4, of the Constitution of the United States.

In the trial of the case it was shown that no gift had been made to one Lawren W. Baker by the deceased during his lifetime, but that Baker had appropriated at least \$54,000.00 belonging to the deceased, to the use of said Baker, and judgment against Baker and the other dependents was rendered in the sum of \$54,000.

It has long been the law in Missouri, and the principle is so well settled that we believe it is unnecessary to cite any statutes or court decisions to the effect that an inheritance tax is a tax upon the right or privilege of receiving a gift, upon

Mr. C. L. Gillilan

the death or in anticipation of the death of another, whether the donor died testate or intestate, and that the incidence of the tax falls upon the recipient of the gift, and only those transfers by which the donee receives a gift, or rather the net value of same coming into possession and enjoyment of the donee is taxable.

Certainly there is abundant evidence that no gift passed to Baker, and that the funds illegally procured from the deceased by him was not a taxable transfer, and hence no inheritance taxes were due the State of Missouri by reason of such facts.

No reference appears to have been made in the trial of the case in Arkansas to the inheritance taxes which might or might not be due on the purported gift to Baker, under Missouri inheritance tax statutes, the court had no jurisdiction to determine such matters if they had been injected into the case, as the courts of one state have no jurisdiction, and lack the power to enforce the statutes of any other state imposing an inheritance tax on certain transfers. Such statutes are to be enforced only in the state in which they are enacted, and in the manner provided in such statutes, they have no extra-territorial effect.

Section 145.150, RSMo 1949, vests jurisdiction in the probate court of the county in which administration proceedings are pending to determine whether or not any taxes are due, the amount of same, and the persons liable for payment, and to determine any question which may arise in connection therewith.

Said section reads in part as follows:

"1. The probate court which grants letters testamentary or of administration, either original or ancillary, on the estate of any decedent, shall have jurisdiction to determine the amount of the tax provided for in this chapter and the person, persons, association, institution or corporation liable therefor, and to determine any question which may arise in connection therewith, and to do any act in relation thereto which is authorized by law to be done by such court in other matters or proceedings coming within its jurisdiction."

* * * * *

It is our thought that the Probate Court of Livingston County, Missouri, had exclusive jurisdiction to determine matters relating to Missouri inheritance taxes which might be due from beneficiaries of the estate of Charles V. Eibler, and in which court administration proceedings on said estate were pending.

Mr. C. L. Gillilan

Our answer to your first question is that there is no obligation of the Director of Revenue of Missouri under the Arkansas Supreme Court mandate as it affects the imposition of a transfer or inheritance tax.

Your second question is, "What is the obligation of the Director of Revenue in regard to a probate court order directing the refund of transfer or inheritance tax?"

We understand your inquiry to specifically refer to the order of the Livingston County Probate Court of June 19, 1950, ordering a refund of inheritance taxes in the sum of \$5,850.00. We have a certified copy of that order before us and quote from that part of same having to do with the refund, said order reads as follows:

"IT IS THEREFORE ADJUDGED BY THE COURT that the Sum of \$5,850.00 paid as a gift tax as aforesaid was an over payment of \$5,850.00 by said Executor to the State Treasurer of the State of Missouri on the 3rd day of June 1946 under section 584 laws of Missouri and sections 596 and 597 of the revised statutes of Missouri for the year 1939, AND THE COURT FURTHER ADJUDGES that the whole amount of \$5,850.00 be refunded by the State Treasurer of the State of Missouri to Antonius P. Eibler, Executor of the estate of Charles V. Eibler, deceased under section 584 laws of Missouri 1945 and sections 596 and 597 of the revised statutes of Missouri for the year 1939, and it is further ordered that a certified copy of this judgment be certified to the Honorable M. E. Morris, State Treasurer of the State of Missouri to the end that said sum of \$5,850.00 be refunded to Antonius P. Eibler as Executor of the estate of Charles V. Eibler, deceased."

Section 584, of the 1939 statutes, relating to the procedure for making application for refund of taxes erroneously paid, and referred to in that portion of above quoted order, has been repealed and section 145.250, RSMo 1949, now provides the procedure to be followed in making such applications, and reads as follows:

"When any tax shall have been paid erroneously to the director of revenue and satisfactory proof of said erroneous payment is presented to him, the director of revenue shall certify

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such claim for refund to the state comptroller, who shall verify the same and issue a warrant for the amount of such tax so erroneously paid, payable to the executor, administrator, or trustee, person or persons who paid the same, and the state treasurer shall pay such warrant out of any funds appropriated for such purposes; provided, that all applications for the refund of said tax shall be made within two years from the date of the accrual of the right to such refund."

Under the provisions of Section 145.150, supra, the Probate Court of Livingston County had jurisdiction to determine the amount of taxes originally paid on June 3, 1946. Upon a proper showing of the facts in the Arkansas case, the court had power to order a reappraisement which showing is assumed to have been made, that there had been no gift to Baker and no taxes due on the funds of the deceased taken by Baker, and to find that an overpayment had been made by reason thereof, and to order that an application for refund be made to the Director of Revenue by the executor, as evidenced by the order of June 19, 1950. This order recited that an overpayment had been made in the sum of \$5,850.00, but we are not giving our opinion as to the correctness of this amount, but only on the questions found in the opinion request. However, it is our further opinion that that part of the court order quoted above ordering the Missouri State Treasurer to refund the taxes paid in the sum of \$5,850.00, is void and of no binding force or effect. Section 145.150, supra, did not give the Probate Court of Livingston County power to make such an order, and he exceeded his lawful authority when he made same.

Section 145.250, supra, sets out the procedure for making applications for refunds, and it is noted that such applications must be made to the Director of Revenue and not to the State Treasurer.

Upon receipt of an application for refund of taxes made under Section 145.250, supra, the Director of Revenue must examine all proof submitted regarding the overpayment. Upon sufficient proof of the erroneous payment it then becomes his duty to certify the claim for refund to the State Treasurer for payment. While the Director of Revenue may consider a court order, and particularly the one of the Livingston County Probate Court of June 19, 1950, along with other proof submitted in connection with the claim for refund, it is our thought that the Director of Revenue is not required to obey the order of the Court for the same reason that the order is in conflict

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with Section 145.250, supra, and attempts to provide a method of refund contrary to this section. The section of the statute and not the court order is to be followed in receiving applications for refunds, and in certifying those found to be valid claims to the State Treasurer for payment.

In answer to your second question, it is our thought that the Director of Revenue of Missouri is not required to obey the order of the Livingston County Probate Court directing the payment of a refund, for the reason that the Court has no jurisdiction to make any such order, and by so doing attempts to direct the payment of a refund in a manner different from that prescribed by Section 145.250. The Director of Revenue must follow the procedure set out in this section, and not that found in the court order.

Your third question refers to Section 145.250, RSMo 1949, particularly the latter portion which provides that all applications for refund of erroneous payment of inheritance taxes shall be made within two years from the date the right accrued. This is in the nature of a statute of limitation and you make the further inquiry as to whether the limitation begins to run from the day of the payment of taxes on June 3, 1946, that of the Arkansas Supreme Court mandate on December 5, 1949; the date of the Livingston County Probate Court order of reappraisal on April 10, 1950; the date the court ordered a refund in the amount of \$5,850.00, on June 19, 1950; or the date of the reappraisal and finding a tax in the amount of \$1,314.57 was filed. In other words, on what date did the right to apply for a refund accrue, and on what date did the statute of limitation provided by this section begin to run? We repeat that part of Section 145.250, supra, in which the twoyear limitation is found, and which reads as follows:

"* * *provided, that all applications for the refund of said tax shall be made within two years from the date of the accrual of the right to such refund."

Upon first thought it would appear that if a tax had been paid erroneously, the right to apply for a refund would accrue and was complete as soon as payment was made, and that the statute of limitation would begin to run against the right on the date of such payment. However, the only Missouri Supreme Court decision we have been able to find in point is that of

Mr. C. L. Gillilan

In Re Estate of Kinsella, 293 Mo. 545, which seems to hold to the contrary. In this case questions were considered and passed upon by the court of the nature of those given above, and which decision involved an interpretation of certain sections of the old collateral Inheritance Tax Law of 1917. The provisions of Section 12 of that law are similar to those of Section 145.250, supra. In discussing the law and determining when the right to apply for a refund accrued and when the two year statute of limitations therein provided began to run, the court at l.c. 559, said:

"The plan of attack in this case has been in the form of pointing out alleged inconsistencies in the Act of 1917. We have just dealt with one of them in the first portion of the opinion. It is urged that the remaindermen (as they call the beneficiaries of this trust) can never have the benefit of a refund of the excess taxes paid, if the class which ultimately gets the fund is entitled to pay at a less rate than the highest rate. This for the reason, as they say, Section 12 of the act only allows two years in which to make application for repayment. Section 12 reads:

"When any tax shall have been paid erroneously to the State Treasurer it shall be lawful for him, on satisfactory proof of said erroneous payment, to refund and pay to the executor, administrator, or trustee, person or persons who paid the same the amount of such tax so erroneously paid; Provided, that all applications for the refund of said tax shall be made within two years from the date of the said payment."

"A sentence in Section 25 reads: 'Such return of over-payment shall be made in the manner provided by Section twelve of this act, upon the order of the court having jurisdiction.'

"Section 12, supra, clearly has reference to an erroneous payment of a tax as a whole, and not to an excess payment provided for by Section 25 for the emergencies of that section. The parties named in Section 12, to whom repayment is to be made, are all in esse, and can make their application within two years.

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This two-year provision in said Section 12 is in the nature of a statute of limitations. The parties must proceed within two years or be barred. The two years begins from the time they were entitled to the refund. If it was an erroneous payment they were entitled to an immediate refund. In other words, their claims for refund arose immediately upon the payment of the erroneous tax.

"When we examine the sentence from Section 25, quoted, supra, it will be noticed that it only provides for a repayment of an over-payment 'in the manner provided for in Section 12 of this act.' That manner is upon satisfactory proof. Under Section 25 no claim arises at the time of payment, but only at the time when it is determined to what particular class the fund goes. A reasonable construction of these two provisions is, that as to the claims for excess payment of taxes under Section 25, the parties would have the two years from the date it becomes settled that there was an excess payment of taxes. This harmonizes this alleged conflict."

Applying the ruling announced in that case to the facts of the instant one, it appears that the right to apply for a refund did not accrue until it had been settled that there had been an erroneous payment, and that the statute of limitation would start running from that date.

As we understand the effect of the ruling in the Kinsella case, there must be a finding of an erroneous payment of the tax, and when this fact is once settled the right to apply for a refund accrues, and at the same time the statute of limitation begins to run.

The probate court of Livingston County by its order of June 19, 1950, found that an erroneous payment of inheritance taxes had been made by the executor of the Eibler Estate. The fact of the erroneous payment was settled on this date, and the right accrued to apply for a refund, and the statute of limitations began to run on the same date.

Therefore, in answer to your third question it is our thought that the right to apply for refund of taxes erroneously paid, accrued on June 19, 1950, and that an application for refund must be made within two years from that date in the manner provided by Section 145.250, supra.

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CONCLUSION

In view of the foregoing it is the opinion of this department that the Chancery Court of Pulaski County, Arkansas, in which the executor of the estate of Charles V. Bibler, deceased, obtained a judgment of \$54,000.00 against one Lawren W. Baker and others for wrongful conversion of funds of the deceased, and which judgment was affirmed by the Arkansas Supreme Court on December 5, 1949, lacked jurisdiction to determine whether a tax was due on the purported gift to Baker under the Missouri Inheritance Tax Statutes. Said judgment did not create any obligation on the Director of Revenue of Missouri with reference to the imposition of a Missouri inheritance tax upon the purported gift to Baker.


While the Probate Court of Livingston County, Missouri, where said estate is being administered, had jurisdiction under provisions of Section 145.150, RSMo 1949, to determine that an erroneous tax had been paid, and that no inheritance taxes were due on the purported gift to Baker, yet, it is our opinion that that part of the probate court order of June 19, 1950, directing the State Treasurer of Missouri to refund \$5,850.00 was void. A probate court has not been granted power under any Missouri statutes to effect a refund of inheritance taxes erroneously paid, in this manner. Section 145.250, RSMo 1949, provides the exclusive procedure for making application for refunds, which must be made to the Director of Revenue of Missouri. The duties of the Director of Revenue in receiving such applications are clearly stated, and said statutory provisions must be strictly followed by him. He has no authority to accept applications, or to certify claims to the State Treasurer for payment, except in the manner provided in said section.

It is the further opinion of this department that the accrual of the right to refund was complete on June 19, 1950, this being the date on which the Probate Court of Livingston County determined that no gift had been made to Baker, there was no tax due on such purported gift, and that there had been an erroneous payment of inheritance taxes by the executor on June 3, 1946. It was also on June 19, 1950 that the matter was finally settled, and on this date that the two year statute of limitations imposed by Section 145.250, supra, began to run against the right to make application for such refund.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

PROSECUTING ATTORNEYS: Prosecuting Attorneys may be reimbursed for actual and necessary traveling expenses in the investigation of crimes and the county court has authority to pay such expenses.

August 7, 1951

8-7-51



Honorable R. M. Gifford
Prosecuting Attorney
Sullivan County
Milan, Missouri

Dear Sir:

You have requested an opinion of this office in the following letter:

"I would appreciate your opinion as to whether or not the prosecuting attorney of a county of the third class, who might leave the state for the purpose of investigating certain facts relative to a crime committed within the county and state where the circumstances would lead him reasonably to believe that such investigation would terminate in the filing of an affidavit charging a particular person or persons with having committed a felony therein, would be entitled to reimbursement by the county court for necessary expenses incident thereto where the budget submitted by the prosecuting attorney to the county court included an item for investigation of criminal offenses and where the county court in that instance had approved such budget.

"It is my intention that your opinion include the above factual situation also with reference to such expenses and travel within the state but outside of the county."

It has been previously said in an opinion of this department on January 23, 1947, that prosecuting attorneys may be reimbursed for actual and necessary traveling expenses in the

Honorable R. M. Gifford

investigation of crimes and the county court is authorized to provide for such expense. This opinion, however, did not consider whether the travel was to be made within or without the State of Missouri. In the present county budget law for counties of the third class in the classification of proposed expenditures, Section 50.680, RSMo 1949, Class 4 thereof reads as follows:

"The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendable nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six."

Class 4 of Estimated Expenditures, Section 50.710, RSMo 1949, reads as follows:

"Pay or salaries of officers and office expense. List each office separately and the deputy hire separately. (County clerk shall prepare estimate for the county court but his failure does not excuse the court.)"

It therefore appears that under this class, Class 4, the county court is authorized to expend funds for the actual expenses incurred by a county prosecutor of a class three county. The most relevant cases that we have found in regard to this matter are Rinehart v. Howell County, 153 S.W. 2d 381, and Bradford v. Phelps County, 210 S.W.2d 996, which are in regard to the stenographic expenses of prosecuting attorneys and not in regard to the expenses of travel and other personal expenses of the prosecuting attorney. Since they relate however to office expense, we believe a reasonable inference can be made that the court would conclude likewise in a claim for actual travel expense of a prosecuting attorney. In the Rinehart case, supra, it was held that the prosecuting attorney could be reimbursed for a reasonable sum paid for necessary stenographic services. The court there stated at l.c. 382, 383:

Honorable R. M. Gifford

" * * * The instant case was submitted on the theory, as disclosed by the stipulated facts and undisputed testimony, that the outlays, as contradistinguished from income, were bona fide, reasonable and actual expenditures for indispensable expenses of the office by respondent (not on the theory that compensation to an officer was involved) and falls within the ruling in *Ewing v. Vernon County*, 216 Mo. 681, 695, 116 S.W. 518, 522(b). That case quoted with approval a passage from 23 Am. and Eng. Ency. Law, 2d Ed., 388, to the effect that prohibitions against increasing the compensation of officers do not apply to expenses for fuel, clerk hire, stationery, lights and other office accessories and held a recorder entitled to reimbursement for outlays for necessary janitor service and stamps, stating: 'Fees are the income of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo.'

In *Bradford v. Phelps County*, 210 S.W. 2d 996, 1.c. 1000, the court said as follows:

"(8) Of course, the Legislature could have provided for salaries for stenographers of prosecuting attorneys in counties of the class including Phelps County, quite as have been provided by statute in counties of other classification. For example, see *Laws of Missouri*, 1945, pp. 574, 578, and 583, Mo. R.S.A. Secs. 12906 et seq., 12957 et seq., 13547.353 et seq. The Legislature has not done so. This does not mean the County Court of Phelps County should not, in the exercise of its discretion, make allowance for the expense of necessitous stenographic service to the prosecuting attorney. But, in the absence of legislation providing a salary or allowance for a

Honorable R. M. Gifford

stenographer or for stenographic service for the prosecuting attorney of Phelps County, the County Budget Law means the County Court of Phelps County has the power to make whatever allowance for stenographic service as it, in its discretion, may deem necessary with a regard to the efficiency of the prosecuting attorney's office, and to the receipts estimated to be available for that and other estimated expenditures, in short, to approve such an estimate as will promote efficient and economic county government. * * *

At l.c. 1001, the Court said:

"Attending the charge the county court's revision of the estimate was arbitrary and capricious, without good cause, and in effect in an abuse of discretion-we will summarize the evidence pertinent to these questions; and in compliance with Section 140(c), Civil Code of Missouri, Laws of Missouri, 1943, at page 395, Mo. R.S.A. Sec. 847.140(c), we must make such an order as to us seems agreeable to law."

Later, at l.c. 1001, the Court said:

"We think it should not be held the evidence demonstrates the county court acted arbitrarily or capriciously, or otherwise in an abuse of its discretion."

(357Mo. 830)

These cases and the cases which are cited in them assume that amounts are to be paid for the necessary equipment, services and out of pocket expense of a public officer in the conduct of his office. Considering the Rinehart and the Bradford cases, it is for the county court to determine the reasonableness of the expenses of the prosecuting attorney and to make provision in the county budget upon the proper estimate of need having been furnished by the prosecuting attorney. In the event the prosecuting attorney believes the county court has acted arbitrarily in its determination of the necessity of the investigation and the expenses thereof, he may bring suit against the county to recover his necessary expenditures.

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With the exception of the references made herein, no statutory authority for the payment of the expenses of a prosecuting attorney has been found. Since there is no statutory provision either for or against such an allowance we believe that the same rule of reasonableness to be determined by the county court would prevail in regard to out-of-state travel expense as well as for traveling expense incurred for travel within each state.


CONCLUSION

It is therefore the opinion of this department that actual expense and mileage incurred by a prosecuting attorney in the necessary fulfillment of the duties of his office should be provided by the county court in accordance with the reasonable discretion of that court. If the county court refuses to pay such expense and is arbitrary or capricious without good cause the prosecuting attorney may sue and recover for such actual reasonable expense from the county.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

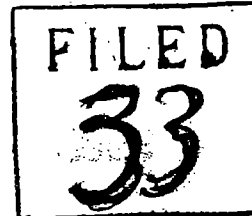
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**INHERITANCE TAXES:
APPRAISERS:**

No Missouri statutes require inheritance tax appraisers to accept inventory-appraisal as sole proof of value of estate property for tax purposes. He may subpoena witnesses, require production of books, records, documents, papers and all other available material evidence by which to ascertain value of su property and base appraisement thereon.

August 23, 1951

Mr. C. L. Gillilan
Assistant Supervisor
In Charge of Inheritance Tax
Department of Revenue
Jefferson City, Missouri



Dear Sir:

Receipt of your request for a legal opinion of this department is herewith acknowledged and said request reads as follows:

"At the top of Chapter 145, Revised Statutes of Missouri, 1949, under the heading 'CROSS REFERENCES' there appears this statement 'Administrator's appraisement of estates to be accepted as basis for assessment of inheritance tax, RSMo 462.020.'

"Several Probate Judges and Inheritance Tax appraisers have raised the question as to whether or not Section 462.020 requires them to accept appraisals shown in the Probate Court Inventory as the basis for assessment of Inheritance Tax.

"This Department has taken the position that it is not mandatory for the Inheritance Tax appraiser to accept the values set out in the original inventory; that the appraiser's duties, as set out in Section 145.160, requires an independent appraisal and authorizes the appraiser to conduct hearings for the purpose

Mr. C. L. Gillilan

of determining values; that the appraiser's oath (Sub-division 4, Section 145.150) also requires him to make an independent appraisal; also it appears the wording of Section 462.020 could be construed as making an exception of Inheritance Tax appraisals ordered by the Probate Court.

"I would be pleased to have an official opinion from your Department relative to this matter."

Reference is made in your letter to Section 462.020, RSMo 1949. This section provides that the executor or administrator shall make an inventory and appraisement of all the real and personal estate of the deceased, describing the quantity, situation, and title of each parcel of real estate, and the fair cash value of same. Likewise each item of personal property and its market value must be given, except those evidences of debt having a fixed value. This section further provides that the inventory appraisal may, under certain circumstances be used as the basis for the assessment of inheritance taxes; said section reads in part as follows:

"Such appraisement verified as provided in this chapter, shall be accepted unless another appraisement be ordered by the court, as proof of the value of the property appraised for the purpose of assessing state inheritance tax * * *."

It appears that Section 462.020, supra, and particularly that portion of same quoted above has given rise to your inquiry which we understand to be whether it is the duty of the appraiser to accept the appraisal of the estate property shown in the inventory as the sole basis for his appraisal of such property for inheritance tax purposes, and in view of this interpretation of your inquiry we shall direct our discussion to this phase of the subject matter.

Section 145.150, RSMo 1949, in effect provides that the probate court before whom the administration proceedings are pending has jurisdiction to determine the amount of state inheritance taxes due, the persons or institutions liable for the payment of same, and to determine any question which may arise in connection therewith. The appointment of an inheritance tax appraiser is also authorized under certain circumstances mentioned in paragraph 3, of said section, to be noted hereafter.

Section 145.150, RSMo 1949, reads in part as follows:

"2. Such court or the judge thereof in vacation shall immediately upon the filing of the inventory and appraisement of the estate of a decedent, examine the same, and if it is apparent, in the opinion of the said court or judge, that such estate is not subject to the tax provided for in this law, such finding and opinion shall be entered of record in said court and thereupon the provisions of section 145.210 shall become inoperative as to the holders of funds or other property thereof, and there shall be no further proceedings relating to such tax, unless upon the application of interested parties the existence of other property or an erroneous appraisement be shown.

"3. If it appear that said estate may be subject to such tax, it shall be the duty of the court to set a day for the hearing and determining the amount of said tax and to cause notice thereof to be given in the same time and manner and to the same parties as is herein provided for appraisers, or the court, before determining such matters, may of its own motion, or on the application of any interested person, including the director of revenue, the prosecuting attorney, or attorney general, appoint some qualified tax-paying citizen of the county, who is not executor, administrator or beneficially interested in said estate or the attorney for any of such parties, as appraiser to appraise and fix the clear market value of any property, estate or interest therein, or income therefrom which is subject to the payment of a tax under the provisions of this chapter.

"4. Every such appraiser shall make and subscribe, and file with the court appointing him, an oath that he will faithfully and impartially discharge his duties as such appraiser and that he will appraise all the property, estate, interest therein or income therefrom involved in the proceeding in which he is appointed at its clear market

value and shall forthwith fix a time and place for hearing the evidence and shall file notice thereof with the court appointing him not less than ten days prior to the date so fixed and shall also give notice by mail to all interested persons whose address he may have, always including the director of revenue and the prosecuting attorney of the county."

Under the provisions of this section two methods are provided by which an estate may be appraised for inheritance tax purposes: 1. by the court, and 2. by an appraiser appointed by the court.

1. In those instances when the court makes the appraisal, it is the duty of the court to set a day for a hearing and determination of the amount of taxes due (if any) from the estate, first having given due notice of such hearing to all interested parties. On the day set for the hearing, if, after hearing the evidence, it appears to the court that taxes are due, it then becomes his duty to appraise the property and assess the amount of taxes found to be due. In such instance no appraiser is appointed, and in performing this duty the court must accept the appraisal of the estate property shown in the inventory as proof of the value of such property for the assessment of the tax.

2. In the event the court does not wish to make the appraisal, he may, either upon his own motion, or upon the application of any interested person, including the director of revenue, the prosecuting attorney or attorney general, appoint some qualified tax-paying citizen of the county to make the appraisal.

Paragraphs 3 and 4 of Section 145.150, supra, authorizes the court to appoint the appraiser, and paragraph 4 of said section 145.150, and section 145.160, provide the duties required of such appraiser.

Section 145.160, RSMo 1949, reads as follows:

"1. The appraiser shall appraise all property, estate, assets, interest or income at its clear market value and he is hereby authorized to issue subpoenas and compel the attendance before him of witnesses and the production of books, records, documents, papers and all other material evidence, to administer oaths and to take the testimony of all witnesses under oath.

"2. He shall make report of his appraisal to the court in writing and shall return the testimony of the witnesses and all other evidence and such other facts in relation thereto as the court may by its order require, and such report shall be made within twenty days after the appointment of such appraiser, unless the court, for good and sufficient cause, by order gives such appraiser further time in which to report; provided, when the estate consists of personal property only, the prosecuting attorney may, with the consent of the director of revenue agree with the parties liable to pay any tax upon the amount of the same, and the court, if it approves such agreement, shall enter judgment accordingly and no appraiser shall be appointed."

VS
It is noted that this section does not specifically mention the inventory, nor does it provide, either expressly or by implication that it shall be the duty of the appraiser to accept the appraised value of the estate property shown in the inventory or base his appraisal upon the inventory-value or that shown in any other single document. As we read this section the appraiser is not limited to any single source from which to obtain information as to the value of such property, but that he is not only authorized, but it is his duty to obtain sufficient information from every available source to enable him to fairly and impartially appraise said property. We base our contention in this connection upon that part of the above quoted statute which provides that the appraiser may subpoena witnesses, require the production of books, records, papers, and documents, "and all other material evidence" of every kind, before him, which may be necessary, or helpful to him in the making of the appraisal.

While the inventory may correctly show the clear market value of the estate property on the date of the death of the decedent and if such values are thus correctly shown, the inventory-appraisal would be a correct guide for the inheritance tax appraiser to follow in making his appraisal, along with other evidence as to the value of such property, but since no Missouri statutes provide that he is required to base his appraisal only upon the values shown in the inventory, our answer to your inquiry is in the negative.

CONCLUSION

It is the opinion of this department that in making his appraisal of the property of a deceased person for inheritance tax purposes, an appraiser is not required under the provisions of any

Mr. C. L. Gillilan

Missouri statutes to accept the appraisal of estate property found in the inventory as sole proof of the value of such property, and to base his own appraisal of such property thereon. He is not limited to this single source of information as to such values, but is authorized under the provisions of the statutes noted above to require the attendance of witnesses before him and the production of any books, records, documents, or papers, and all other material evidence available which may be necessary or helpful to him in making his appraisement of all estate property at its clear market value.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PNC:hr

SHERIFFS:
COUNTY COURT:

Sheriffs of class two counties are required to purchase supplies in accordance with Sections 50.760 to 50.790, inclusive, RSMo 1949.

October 10, 1951

10-11-51

FILED
33

Honorable Gerald W. Gleason
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

This is in reply to your recent request for an opinion, which reads as follows:

"Sheriff Glenn Hendrix, of Greene County, Missouri, has asked us to write to you for an opinion on the following matter.

"As Sheriff, he is desirous of purchasing daily supplies for the jail without going through the County Court. These supplies consist of soap, disinfectant and other necessary and ordinary jail needs, exclusive of the food and care of the prisoners. The expenditures would be under the sum of \$25.00. The Sheriff has stated that it is necessary to spend a great deal of time waiting on the Court for permission to buy these articles. The Court has told him that all the purchases in the county must be made through the County Court.

"We would appreciate your opinion as to whether or not these daily supplies could be purchased by the Sheriff without consultation and permission of the County Court and chargeable to the county as its debt."

In regard to purchases by class two counties, we quote Section 50.760, RSMo 1949, as follows:

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"It shall be the duty of the judges of the county court in all counties of the second class, on or before the first day of February of each year, to determine the kind and quantity of supplies, including any advertising or printing which the county may be required to do, required by law to be paid for out of the county funds, that will be necessary for the use of the several officers of such county during the current year, and to advertise for sealed bids and contract with the lowest and best bidder for such supplies. Before letting any such contract or contracts the court shall cause notice that it will receive sealed bids for such supplies, to be given by advertisement in some daily newspaper of general circulation published in the county, such notice to be published on Thursday of each week for three consecutive weeks, the last insertion of which shall not be less than ten days before the date in said advertisement fixed for the letting of such contract or contracts, which shall be let on the first Monday in March, or on such other day and date as the court may fix between the first Monday of March and the first Saturday after the second Monday in March next following the publication of such notice; provided, that if by the nature or quantity of any article or thing needed for any county officer in any county of this state to which sections 50.760 to 50.790 apply, the same may not be included in such contract at a saving to such county, then such article or thing may be purchased for such officer upon an order of the county court first being made and entered as provided in sections 50.760 to 50.790; and provided further, that if any supplies not included in such contract be required by any such officer or if the supplies included in such contract be exhausted then such article or thing may be purchased for such officer upon order of the county court first being made and entered of record as provided in sections 50.760 to 50.790."

Section 50.780, RSMo 1949, among the sections referred to in the above section, declares it to be unlawful for a county

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officer to purchase supplies not contracted for as provided in Sections 50.760 to 50.790, RSMo 1949, unless he first applies to and obtains an order from the county court under its official seal for the purchase of such supplies. This section also sets out that such an order shall be in the form of a requisition and any such requisition filed without the aforementioned approval of the county court shall not be paid for out of county funds.

The sections referred to above may be the provisions which your county court has in mind. These sections require that the purchase of supplies be made through the method as prescribed. In regard to this matter, in 1909, our Supreme Court held that a county sheriff could purchase supplies for keeping his jail in good and sufficient condition without authority from a county court. The court stated in the case of Harkreader v. Vernon Co., 216 Mo. 696, 116 S.W. 523, 1.c. Mo. 708, 709:

"It is written in the statutes that jails should be 'kept and maintained in a good and sufficient condition,' etc. (R.S. 1899, sec. 8104), that is, 'good and sufficient' in a modern sanitary sense, having an eye to the sure results established by scientific investigation of the disease-breeding effects of filth and bad air. That statute is broad enough to cover the extraordinary condition disclosed by the record.

"We are driven to the conclusion there was more pique than principle at bottom in the action of the county court.

"Let the judgment be affirmed. It is so ordered. All concur, except Graves, J., who took no part."

Again, in regard to supplies needed for county jails, we quote from Kansas City Sanitary Co. v. Laclede County, 307 Mo. 10, 269 S.W. 395, 1.c. 398:

"* * * No question of that sort can be successfully raised as to any part of the goods ordered for and used at the county jail. Under Section 12549 the jail is required to be kept in good and sufficient condition and under Section 12551 the sheriff of the county has the

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custody, keeping, and charge of the jail. He therefore has full authority to purchase all supplies necessary to keep such jail in good and sufficient condition, which includes sanitary condition, and needed no authorization by the county court to render the county liable for purchases for such jail for such purpose. * * *

This case was decided in 1925.

There has been no material change in the statute requiring the sheriff to keep the jail. Sections 221.010 and 221.020, RSMo 1949, now refer to the keeping of the jail in good and sufficient condition and repair, and are now as follows:

"221.010. Location of county jails.- There shall be kept and maintained, in good and sufficient condition and repair, a common jail in each county within this state, to be located at the permanent seat of justice for such county."

"221.020. Sheriff to be jailer.- The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible."

At the time that the above decisions were made by our Supreme Court, the authority of a county officer to purchase necessary supplies for his office was not limited by statute as it is and has been since 1933. It must not be forgotten that at the time the above quoted Supreme Court decisions there was no county budget law, nor were there any statutes at that time directing the manner and means of making county court purchases as there are now. Sections 50.760 to 50.790, RSMo 1949, were first enacted as Laws of 1933, pages 201, 202, and 203. These sections provided a method for the purchase of supplies by counties, and we believe that they are mandatory.

In view of the definite provisions of Section 50.760, supra, it is our opinion that the sheriff as one of the officers of the county is required to purchase his supplies for the jail in accordance with Sections 50.760 to 50.790, RSMo 1949.

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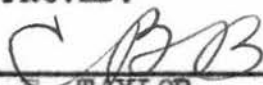
CONCLUSION

It is, therefore, the opinion of this department that sheriffs of class two counties are required to purchase supplies in accordance with Sections 50.760 to 50.790, RSMo 1949, under the contract as outlined therein, if any supplies not included in such contract be required or if the supplies included in such contract be exhausted, then such article or thing may be purchased for the sheriff upon order of the county court first being made and entered of record.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

JWfab

COUNTIES: Trustees operating county public hospital established under Section 205.160, RSMo 1949, authorized to
HOSPITALS: anticipate special current tax levy for purpose of paying superintendent of hospital and county court in third and fourth class counties is required to issue warrants therefor on the county hospital fund.



October 19, 1951

10-19-51

Honorable R. M. Gifford
Prosecuting Attorney
Sullivan County
Milan, Missouri

Dear Sir:

The following opinion is rendered in reply to your recent inquiry reading as follows:

"Your opinion on the following set of circumstances would be deeply appreciated:

"Sullivan County, a county of the third class voted in favor of the construction of a county hospital several months ago and the county court of recent date has approved the employment of a so called administrator or manager of such hospital by the county hospital board and the question has now arisen as to how the court may pay the salary of such administrator during the balance of this year. A ten cent maintenance tax was levied by an order of the county court earlier in 1951 and such assessment is being extended at this time on the tax books by the county clerk but no provision was made in the budget for the payment of such administrator and the question has arisen as to whether it would be proper for the court to order the issuance of warrants in payment of such salary in anticipation of the revenue from the ten cent levy."

For the purpose of this opinion it is conceded that the hospital recently established in Sullivan County came into being by virtue of authority contained in Section 205.160, RSMo 1949, which provides as follows:

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"The county courts of the several counties of this state are hereby authorized, as provided in sections 205.160 to 205.340, to establish, construct, equip, improve, extend, repair and maintain public hospitals, and may issue bonds therefor as authorized by the general law governing the incurring of indebtedness by counties."

Section 205.200, RSMo 1949, as repealed and reenacted by H. B. 229, 66th General Assembly, provides as follows:

"Except in counties operating under the charter form of government, the county court in any county wherein a public hospital shall have been established as provided in sections 205.160 to 205.340, shall levy annually a rate of taxation on all property subject to its taxing powers in excess of the rates levied for other county purposes to defray the amount required for the maintenance and improvement of such public hospital, as certified to it by the board of trustees of the hospital; the tax levied for such purpose shall not be in excess of twenty cents on the one hundred dollars assessed valuation. The funds arising from the tax levied for such purpose shall be used for the purpose for which the tax was levied and none other."

The statute, just quoted, authorizing the tax levy clearly discloses that such tax is a special tax and that funds arising therefrom are to be set apart from ordinary revenue of the county and used for the purpose for which the levy was made, and for no other purpose.

It stands admitted that the special tax levy was made by the county court in the early part of 1951 and has by this time been duly extended on the tax books. The sole question to be decided here is whether the county court may issue its warrant on the anticipated revenue from such levy to pay the superintendent of such hospital without such expenditure having been budgeted in the 1951 county budget.

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Under Section 205.190, RSMo 1949, the management and control of the hospital is vested in a board of trustees and in such section we find powers vested in such trustees in the following language:

"2. The county treasurer of the county in which such hospital is located shall be treasurer of the board of trustees, and in counties which have no treasurer the county collector shall be the treasurer of the board of trustees. The treasurer shall receive and pay out all the moneys under the control of the said board, as ordered by it, but shall receive no compensation from such board.

* * * * *

"4. * * * They shall have the exclusive control of the expenditures of all moneys collected to the credit of the hospital fund, and of the purchase of site or sites, the purchase or construction of any hospital buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased, or set apart for that purpose; provided, that all moneys received for such hospital shall be deposited in the treasury of the county to the credit of the hospital fund, and paid out only upon warrants ordered drawn by the county court of said county upon the properly authenticated vouchers of the hospital board.

"5. Said board of hospital trustees shall have power to appoint a suitable superintendent or matron, or both, and necessary assistants and fix their compensation, and shall also have power to remove such appointees; and shall in general carry out the spirit and intent of sections 205.160 to 205.340 in establishing and maintaining a county public hospital."

The county hospital law was before the Supreme Court of Missouri in the case of State ex rel. Holman v. Trimble, 293

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S.W. 98, 316 Mo. 1041, and the powers of trustees under these statutes were alluded to in the following words as the Supreme Court was construing a previous opinion of the Kansas City Court of Appeals. The court spoke as follows at 316 Mo., l.c. 1047:

"The Court of Appeals construed these statutes to mean that hospital trustees have exclusive control of the expenditure of moneys collected to the credit of the hospital fund. The natural interpretation of that language excludes the intervention of any other official in determining what claims are to be paid and what accounts ought to be allowed. The plain words mean that full discretion is vested in the hospital board to pass upon and determine the validity of every claim presented. Relators call attention to the provision that the money must be deposited in the treasury of the county and must be paid out only upon warrants drawn by the county court, and argue that the county court is thus vested with some discretion, some function to determine whether or not the claims presented are valid, but that same sentence of the statute goes on to say that such payments are made upon properly authenticated vouchers of the hospital board. That seems to leave no doubt that the only judgment exercised by the county court is determined whether the vouchers presented show proper authentication of the hospital board, and whether they are for purposes within control of the hospital board and for the purposes of the above statute. If such vouchers should show on their faces that they were issued for purposes foreign to the field controlled by the hospital board, the county court could deny warrants. * * *

We next pass to the question of whether the board of trustees may call upon the county court to issue its warrant on the special hospital fund when such fund is merely anticipated from a current tax levy, but the actual existence thereof awaits the collection of the tax levied. By enactment of the enabling legislation providing for a county public hospital, the legislature has recognized the project as a proper governmental function;

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provision for a special tax levy over and above that permitted for general governmental purposes to defray costs of maintenance and operation of such hospital evidences the importance of such legislation; and placing responsibility for the proper and efficient management of such hospital in a board of trustees elected by the people does not take away from this project any of its characteristics as a proper governmental function. This being so, we conclude that it is within the power of the board of trustees, in furtherance of an efficient administration of such hospital, to anticipate its current revenue from a proper tax levy properly extended on the tax books for the current year, and the county court is duty-bound to honor vouchers of such trustees and issue warrants on such special funds to defray current operating costs of such hospital. No citation of authority is necessary to disclose that county courts in this state are permitted to issue warrants in anticipation of current general revenue and we see no reason why such privilege should not be extended to current anticipated revenue resulting from a special tax levy for the support and maintenance of a county public hospital.

We now turn to that portion of the opinion request which discloses a doubt relative to the applicability of the county budget law to funds derived from the special tax levy for the support and maintenance of the county public hospital. The county budget law applicable to third and fourth class counties is found in Sections 50.670 to 50.740, RSMo 1949. Section 50.670, RSMo 1949, defines the word "revenue" as follows:

"* * *Whenever the term 'revenue' is used in sections 50.530 to 50.740 it shall be understood and taken to mean the ordinary or general revenue to be used for the current expenses of the county as is provided by sections 50.530 to 50.740, regardless of the source from which derived. * * *"

Section 50.680, RSMo 1949, providing for classification in the budget of proposed expenditures fails to mention expenditures for maintenance and operation of a county public hospital among those which must be classified, and specifically exempts from classification and apportionment any funds for upkeep of roads in any special road district. The reason for this can best be summarized in the following language from State ex rel. Armontrout v. Smith, 182 S. W. (2d) 574, 353 Mo. 486, l.c. 492:

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"All of these acts, the Budget Act, the Purchasing Agent Act and the County Budget Act were passed at the same session in 1933. Their primary purpose was to regulate the usual operation of the regular departments of Government whose needs could be foreseen and planned on a biennial basis."

We are mindful of the following holding in State ex rel. Ginger v. Palmer, et al., 198 S.W. (2d) 10, 1.c. 11:

"The Budget Law, even before the 1941 amendment, contemplated the budgeting of all the county funds and the issuance of a warrant in excess of the revenue for any purpose constituted a violation of that law. * * *"

The Palmer case can be distinguished from the facts being considered here, for in that case the court was considering income derived from the statutory county-wide tax levy for road and bridge purposes, and the county court in such instance had failed to mention such anticipated revenue in its budget. Of course, the Court in the Palmer case was justified in alluding to such funds as county funds which should have been budgeted, but such funds bear little or no resemblance to the funds provided for by the special tax levy authorized to maintain a county public hospital. Another salient fact which convinces us that funds derived from the special tax levy for maintenance of a county public hospital are not to be considered as county revenue to be budgeted, is inferred from the language found in Section 205.230, RSMo 1949, which provides as follows:

"In counties exercising the rights conferred by sections 205.160 to 205.340, the county court may appropriate each year, in addition to tax for hospital fund herein provided for, not exceeding five per cent of its general fund for the improvement and maintenance of any public hospital so established."

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The above quoted statute gives county courts power to augment county public hospital funds by an appropriation from its general revenue funds, and this is tacit admission that the fund augmented is not county revenue within the meaning of the county budget act, and no requirement that it be budgeted has been found in the county budget law.


CONCLUSION

It is the opinion of this department that county courts in third and fourth class counties are required to issue warrants upon properly authenticated vouchers of the board of trustees of a county public hospital, established by authority contained in Section 205.160, RSMo 1949, so long as such warrants do not exceed the current anticipated revenue from the special tax levy as made and authorized by Section 205.200, RSMo 1949, as repealed and reenacted by H. B. 229, passed by the 66th General Assembly, and such revenue is not required to be budgeted under the county budget law found at sections 50.670 to 50.740, RSMo 1949.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

JLO'M:ba

SCHOOLS: Where there has been a failure to extend on the regular tax book for the use of the county collector a school
TAXATION: tax levy legally authorized the county clerk must prepare a supplemental tax book with said tax extended thereon so that the same may be collected.



November 27, 1951

12-3-51

Honorable R. M. Gifford
Prosecuting Attorney
Sullivan County
Milan, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department which in part reads:

"Reorganized District No. 3 consisting of territory in the four above named counties was set up by virtue of the provisions of section 165.657 and subsequent sections of the Revised Statutes of Mo. 1949. This district is located such that it includes territory in each of the four separate counties above named and at an election held earlier this year a \$1.00 building levy was approved by a majority vote of those voting at such election. There is no question as to the proceedings with reference to the calling or the conduct of that election but due to the fact that it was approved by the voters rather late in the year it seems that notice thereof was not passed on to the proper authorities in Mercer county so that at this time such additional tax has not been extended on the county books and as a result thereof those members of District No. 3 living in Mercer County will not pay the additional tax yet those residing in Sullivan, Grundy and Putnam Counties will find such additional tax extended and placed upon their tax assessment.

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"An opinion of your office is sought as to whether or not such tax may be collected against those persons residing within Sullivan County, Missouri, in view of the fact that residents of Mercer County who will receive the identical benefits of said district will not pay such tax. * * *"

As we understand the facts presented in your request, a particular reorganized school district with territory extending into four different counties sometime during this year voted a school tax levy. The election wherein the tax levy was voted was properly conducted, the levy was approved by a majority vote of those voting in the election and it is our understanding that the levy in question was in every respect properly authorized.

It is our further understanding that the tax levy voted by the school district has been duly extended on the tax books by the county clerk in the counties of Sullivan, Putnam and Grundy, but that said tax levy has not been extended on the tax book in Mercer county by the county clerk.

Therefore, the basic question presented is what procedure should be followed in view of the state of affairs above outlined.

Section 165.080, RSMo 1949, provides for the manner of increasing the rate of taxation within a school district and in part reads:

"* * *and if two-thirds of the qualified voters voting thereon shall favor the proposed increase for any purpose, the result of such vote, including the rate of taxation so voted in such district for each purpose, and the number of years said rate is to be effective, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, who shall, on receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all taxable property, real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants as provided by law."

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Under the above section when a school tax levy has been voted certification must be made by the clerk or secretary of the school district to the county clerk of the proper county who shall upon receipt thereof proceed to assess said tax and extend it on the tax books. Regarding the time when this is normally done, Section 137.290, RSMo 1949, provides as follows:

"The assessor's book shall be corrected and adjusted not later than September first of each year. The clerk of the county court in each county, upon receipt of the certificates of the rates levied by the county court, school districts and other political subdivisions authorized by law to make levies or required by law to certify levies to the county court or clerk of the county court, shall then extend the taxes in the assessor's book, in proper columns prepared for such extensions, according to the rates levied; and shall on or before the thirty-first day of October of each year deliver the tax book with the rates extended therein to the collector. The assessor's book, with the taxes so extended therein, shall be authenticated by the seal of the court as the tax book for the use of the collector; and when the assessor's book is in two or more volumes, such extension shall be made in all such volumes, and each volume shall be authenticated by the clerk with the seal of the court. And upon a failure to make out such extension of taxes in the assessor's book or books, as the case may be, and deliver same to the collector not later than October thirty-first, the county court shall deduct twenty per cent from the amount of fees which may be due the clerk for making such extension, and such assessor's book, with the taxes so extended therein, shall be called the 'tax book.'"

While under the above section taxes are normally extended on the tax book by the county clerk prior to October 31, it is conceivable that a school tax levy authorized by an election held late in the year may not be certified to the county clerk in time for him to extend said tax levy on the tax book prior to the delivery of the tax book to the county collector.

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Regardless of the time when certificate of the tax levy voted by the school district may have been given to the various county clerks, we are confronted with the situation where a tax levy has been legally voted by a school district but the same has not been extended on the tax book of one of the proper counties involved, to-wit, Mercer county. We believe that Section 137.300, RSMo 1949, provides for the procedure to be followed when such a situation exists. Said section in part reads:

"When for any cause there has been a failure to levy the state, county, school or other taxes, or any portion thereof, or to extend and authenticate the same for the use of the collector, or to make out and deliver to the collector a proper tax book for the collection of the same, as required by law, in any county for any year or years, the clerk of the county court of such county for the time being, when so required for such state taxes by the state tax commission, and for such county, school or other taxes by the county court, shall make a supplemental tax book for such year or years. Such supplemental tax book shall be made upon the assessments for the year or years for which the taxes should have been levied, or where there has been a failure to assess the property, upon the assessment made as required by section 137.295, the taxes for each year to be in a separate book and to be levied for such state, county, school and other taxes, or portions of the same, as had failed to be levied and collected at the proper time. * * *"

In view of the provisions of the above statute, the residents of Mercer County will be liable for payment of the tax voted by the school district inasmuch as the county clerk of that county would be required to prepare a supplemental tax book for the use of the county collector upon which the tax levy voted by the school district would be properly extended and subsequently collected.

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In the case of State ex rel. Thompson, v. Jones, 41 S.W. (2d) 393, the state auditor and others instituted a proceeding in mandamus against the county clerk of Morgan county to compel the clerk to compute and extend taxes for the particular year which had been omitted. The clerk had delivered the tax books to the county collector without computing and extending said taxes. In ruling on the question, the court at l.c. 399-400, said:

"However, respondent's wrongful act in delivering the tax books to the collector without computing and extending the taxes on the assessment here in question will not deprive relators of the relief sought in this proceeding. The prayer of relators' petition is that the court 'grant its writ of mandamus directed to the respondent, commanding and requiring him as Clerk of the County Court of Morgan County, Missouri, to compute and extend the taxes levied by lawful authority in Morgan County, Missouri, and by the State of Missouri, for the year 1930 against said property of said corporation upon the valuation thereof as found, fixed and assessed by said agent of the State Tax Commission and approved by said State Tax Commission and by the State Board of Equalization of the State of Missouri, and for such other orders, judgments and decrees in the premises as may be just and proper.'

"Section 9878, Rev. St. 1929, thus provides for the making of a supplemental tax book: 'When for any cause there has been a failure to levy the state, county, school or other taxes, or any portion thereof, or to extend and authenticate the same for the use of the collector, or to make out and deliver to the collector a proper tax book for the collection of the same, as required by law, in any county for any year or years, the clerk of the county court of such county for the time being, when so required for such state taxes by the state auditor, and for such county, school or other taxes by the county court, shall make a supplemental tax book for such year or years. * * *'

Honorable R. M. Gifford

"Section 9856, Rev. St. 1929, empowers the state tax commission as follows: '* * * The state tax commission is hereby given any power statutory law confers on revenue officers necessary to make effective and complete the assessment and collection of the revenue, and may do any and all things necessary in compliance with existing statutes to perfect, complete and make effective the assessment and collection of the revenue.'

"In the situation disclosed by respondent's return, we may treat the commencement of this suit as a request on the part of the state tax commission, in the exercise of the power thus conferred upon it, for respondent to make out and deliver to the county collector such supplemental tax book showing computation and extension of taxes as above prayed."

The above case was affirmed in the companion case of State ex rel. Thompson v. Collier, 41 S.W. (2d) 400, where at l.c. 402 the court said:

"* * * The action of the state tax commission became final when approved by the state board of equalization (section 9855, Rev. St. 1929), and if said county clerk had not extended the taxes before receiving the certified copy of the order of the state board of equalization, it would not only have been his unqualified duty to have done so thereafter but if he had delivered the tax books to the county collector without having done so he could have been compelled to make out and deliver to the county collector a supplemental tax book showing the proper extension. Sections 9878 and 9856, R. S. 1929, and State ex rel. L. D. Thompson v. Jones, supra."

In view of the foregoing statutory provisions and authorities, it would follow that all of the residents within the school district in question will ultimately be required to pay the school tax levy legally authorized by vote of the people within the school district.

Honorable R. M. Gifford


CONCLUSION

It is therefore the opinion of this department that when for any cause there has been a failure to extend on the tax book for the use of the county collector, a school tax levy legally authorized it is the duty of the county clerk to prepare a supplemental tax book with said tax properly extended thereon for use of the county collector in collecting said tax.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RFT:ba

COUNTY CLERKS

) County Clerks in third class counties may retain fees
) collected under Section 51.400, RSMo 1949, in addition
) to their salaries and do not have to account for same,
) but cannot retain fees collected under Section 51.410,
) RSMo 1949, which fees are to be accounted for and paid
) over forthwith to the County Treasury.

March 14, 1951

FILED

35

Honorable Philip A. Grimes
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Mr. Grimes:

This is in reply to your letter requesting an opinion from this office on questions concerning salary and fees of the county clerk of your county, a third class county. Your restated questions are as follows:

Question Number One: May the county clerk of Boone County, a third class county, retain the fees and compensation provided for under Section 51.400, RSMo 1949, in addition to his salary as provided in Section 51.310, RSMo 1949?

Question Number Two: May the county clerk of Boone County retain the fees provided for under Section 51.410, RSMo 1949, in addition to his salary as provided in Section 51.310, RSMo 1949?

In answer to your question number one we are enclosing herewith copy of an opinion of this department dated November 23, 1949, to Honorable W. H. Holmes, State Auditor, Jefferson City, Missouri. This opinion apparently answers your question number one in the affirmative.

Your second question refers to Section 51.410, RSMo 1949, which section, except services and amount of fee for each service, is as follows:

"The clerks of the county courts, respectively, shall be allowed fees for their services as

Hon. Philip A. Grimes

follows: * * * (Various services and fees are here omitted. For same see Section 51.410, RSMo 1949.)

In answer to your question number two we call your attention to Sections 50.370 and 50.390, RSMo 1949. Said Section 50.370, supra, is as follows:

"In all counties of classes three and four, every county officer who receives any fees or other remuneration for official services which is payable to the county, except recorders of deeds whose offices are separate from that of circuit clerks, shall, at the end of each month file a verified report with the county court of his county showing all fees charged and accruing to his office and the act or service for which each such fee was charged, together with the names of persons paying or liable for same. Upon the filing of such report, each said county officer shall forthwith pay over to the county treasurer all fees and other moneys collected by him which belong to the county and shall take two receipts therefor, one of which shall be filed with the county court and the other shall be kept on file in his office. Every such officer shall be liable personally and on his official bond for all fees collected by him and not accounted for and paid into the county treasury as herein provided."

(Emphasis ours.)

Said Section 50.390, supra, is as follows:

"All county officers and other persons chargeable with moneys belonging to any county shall render their accounts

Hon. Philip A. Grimes

to and settle with the county court in the manner and at the time prescribed by law."

These sections specifically provide that in all counties of Classes three and four (Boone County is in Class three) every county officer who receives fees for official services which are payable to the county shall make a monthly report of such fees to the county court, and upon filing such report such officer shall forthwith pay over to the county treasury all moneys collected by him which belong to the county and such officer shall be liable personally and on his official bond for all fees collected by him and not accounted for and paid into the county treasury.

You will note that Sections 51.340 and 51.400, RSMo 1949, both of which sections apply to your county, each provide that in addition to salary certain remuneration or fees shall be allowed the clerk of the county court, or retained by him, as unaccountable fees, while said Section 51.410 has no such provision. Therefore, fees collected under this section (51.410) cannot be retained but must be accounted for to the county court and paid into the county treasury.

We are of the opinion that the last two quoted sections cover fees collected under the provisions of Section 51.410, RSMo 1949, and that the county clerk of your county has no authority of law to retain fees collected under this section, but under the provisions of the above-quoted sections he must account for such fees and pay the money collected under this statute to the county treasurer.

CONCLUSION

It is, therefore, the opinion of this department that fees collected by your county clerk under the provisions of said Section 51.400, RSMo 1949, shall be retained by the clerk, as unaccountable fees, in addition to his salary as provided by law.


Hon. Philip A. Grimes

It is our further opinion that fees collected by your county clerk under the provisions of said Section 51.410, RSMo 1949, shall be reported to the county court and such fees so reported shall be forthwith paid over to the county treasury. Such officer failing to so report and to pay over such fees would be liable personally and on his official bond for fees collected under said Section 51.410, RSMo 1949.

Respectfully submitted,

GROVER C. HUSTON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

Enclosure

GCH/feh

SENATE BILL NO. 38: Senate Bill No. 38 of the 66th General Assembly of Missouri shall take effect and be in force on and after the 9th day of October, 1951.

August 8, 1951

8-8-51

Honorable Philip A. Grimes
Prosecuting Attorney
Boone County
Columbia, Missouri



Dear Sir:

Your recent request for an official opinion has been assigned to me to answer. You thus state your opinion request:

"The Probate Judge of this county has just requested that I determine the effective date of the law which started as Senate Bill No. 38 of the last or present session. This bill has to do with the salary of the clerk of the Probate Court.

"I have tried to contact our representative and upon this failure I am writing to your office. When does the law become effective, or when does the salary change?"

Senate Bill No. 38 of the 66th General Assembly of Missouri was finally passed on May 23, 1951. It was approved by the Governor on June 16, 1951.

On June 15, 1951, there was passed by the General Assembly of Missouri, House Concurrent Resolution No. 12, which reads:

"Whereas, Section 29, Article II of the Constitution of 1945 provides that if the General Assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective, shall take effect ninety days from the beginning of such recess and,

Honorable Philip A. Grimes

"Whereas, the 66th General Assembly has resolved to recess for a period beginning July 11, 1951, and ending August 15, 1951,

"Now, therefore, be it resolved by the House of Representatives and Senate jointly, that all laws passed by the 66th General Assembly of the State of Missouri, on or before the 11th day of July, 1951, and not effective, shall take effect ninety days from the beginning of said recess, that is to say, shall take effect and be in force on the 9th day of October, 1951."

Senate Bill No. 38 was not passed with an emergency clause and therefore, was not in effect on or before the 11th of July, 1951.

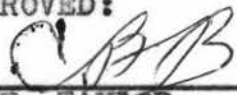
CONCLUSION.

It is the opinion of this department that Senate Bill No. 38 of the 66th General Assembly of Missouri will take effect and be in force on and after the 9th day of October, 1951.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

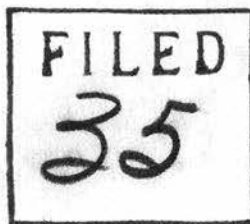
APPROVED:



J. E. TAYLOR
Attorney General

HPWab

CORONERS: Witnesses appearing at coroner's inquest entitled to be aided by counsel but witnesses and their counsel not authorized to cross examine other witnesses.



October 8, 1951

10-8-51

Honorable Philip A. Grimes
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

The following opinion is rendered in reply to your recent request reading as follows:

"In reply to your letter of June 13, I regret that I must ask for an opinion from your office with reference to the question of power of attorneys representing persons involved in a Coroner's inquest or other persons who might be liable, depending upon the Coroner's jury verdict, to interrogate witnesses or otherwise participate in the inquest.

"I have advised our Coroner to a limited extent, but he appears not to be completely satisfied and I will appreciate your opinion."

Chapter 58, RSMo 1949, entitled "Coroners and Inquests" containing Missouri's statutory provisions relating to powers and duties of coroners and the manner of holding inquests is silent on the question posed in your inquiry. We have failed to discover any adjudicated cases in this state on this question. In this event we look to other jurisdictions and authorities for the general rule on the question.

In 18 C.J.S., Coroners, Section 20, we find the rule stated as follows:

"The general rule is that neither the witnesses nor others whose rights may be affected by the verdict or findings of

Honorable Philip A. Grimes

the inquest have a right to be represented by counsel at the inquest. The State, however, may be represented by a district attorney, who has the power to cross-examine witnesses; and in at least one jurisdiction, where the person suspected of causing the death is under arrest, he has the statutory right to be represented by counsel, who may cross-examine the witnesses."

In 13 Am. Jur., Coroners, Section 9, we find the rule stated as follows:

"An accused or suspected person has no right to appear by counsel at a coroner's inquest or to cross-examine witnesses unless such right is conferred by statute."

The reason for the rule pronounced by both of the above cited authorities is disclosed in State v. Griffin, 98 S.C. 105, 82 S.E. 254, 1.c. 255, where the court spoke as follows:

"The court was also requested to rule upon the question whether a person, in anticipation of the action of the coroner's jury, has the right to appear by counsel and to cross-examine the witnesses in behalf of his client. The proceedings are intended to be merely a preliminary investigation and not a trial involving the merits. The only object which a suspected person could have in appearing by counsel would be to prevent a full investigation insofar as it might tend to incriminate him and thus defeat the purpose of the inquest."

In Aetna Life Insurance Company v. Milinard, 82 S.W. 364, 118 Ky. 716, evidence obtained at a coroner's inquest was sought to be introduced in the trial of a case based on an accident insurance policy. In ruling such evidence inadmissible, the court spoke as follows at 118 Ky., 1.c. 725-726:

"While the coroner's inquest is a public function, made on behalf of the State, and while a record of it is required to be made and kept, it cannot on any well

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grounded principle of American common law, become evidence in another inquiry or suit as to the cause of the death investigated. The business of this tribunal is by statute to collect promptly the facts concerning deaths which the coroner has reason to believe were the result of crime. Like the grand jury, it projects an ex parte investigation of supposed or alleged crime resulting in homicide for the purpose of aiding in the administration of the criminal laws of the State. The accused is neither represented, nor has the right to be, at the inquiry. * * *."

The authorities above quoted hold that witnesses subpoenaed to testify at a coroner's inquest may not themselves, or by their counsel, participate in the proceedings to the extent of cross-examining other witnesses appearing at the inquest, but we have found no authority which would deny to any person subpoenaed to testify at such an inquest the right to have his attorney at his side to aid and counsel him in giving answers to questions propounded to him so as to guard against self-incriminating testimony, and guaranteeing that statements given by such witness will be voluntary and made without coercion of any kind. It is important to the proper administration of justice that relevant testimony given at a coroner's inquest be admissible in criminal proceedings that may at a later date involve such testimony, and the test of its subsequent admissibility in the criminal proceeding is found discussed in *State v. Burnett*, 206 S.W. (2d) 345; 357 Mo. 106, 1.c. 112, 113, 114, where the court spoke as follows:

"Section 19 of article I of the 1945 constitution provides: 'That no person shall be compelled to testify against himself in a criminal cause. . . .' The immunity afforded a witness by the "Constitutional provisions is broad enough to protect him against self-incrimination before any tribunal in any proceeding; it is not merely to shield a witness at his final trial but extends its protection in preliminary proceedings.' In *re West*, 348 Mo. 30, 152 S.W. 2d 69, 1.c. 70.

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"In the case of State v. McDaniel, 336 Mo. 656, 80 S.W. 2d 185, we ruled the testimony given by the accused at a coroner's inquest, if given voluntarily, could be used against him at his trial for the reason that he could waive his constitutional right to immunity. We also ruled that where a defendant was subpoenaed as a witness and appeared at a coroner's inquest and testified, that fact alone did not make his testimony inadmissible. The test as to the admissibility of this character of testimony is no longer whether it was made in a judicial proceeding under oath but: Was it voluntary? If so, then it is admissible, otherwise not. Whether such testimony was voluntarily given must be determined on the particular facts of each case: 'Whether the defendant was ignorant; whether he had counsel; whether he was advised of his rights; whether coercive methods were employed in obtaining the statement from him, etc.' Loc. cit. 195. In that case the coroner advised him of his rights and he understood this advice. We held that under those circumstances the defendant's testimony given at the coroner's inquest was admissible at the trial.

"In this case the appellant was arrested by the sheriff at the restaurant and taken by him to the coroner's inquest. In the presence of his wife and son Gene he asked the sheriff if he had to testify and was told they would all have to testify. The appellant had no attorney. He testified that he could sign his name but he could not read or write. Both the sheriff and the acting coroner testified that they did not advise the appellant about his constitutional rights. In fact, he was not allowed to be present when the other witnesses testified but was kept in an automobile. No witness was allowed to hear the testimony of the other witnesses. Strangely, the name of the appellant, his wife and his son Gene were indorsed on the information as witnesses for the state.

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"In the case of State v. Pearson, 270 S.W. 347, we held that the defendant's testimony before the coroner's inquest was involuntary. The facts in that case were very similar to the facts in this case. In ruling that case we said:

"We are of the opinion in this case that, on the facts aforesaid, the defendant did not know that the testimony which he was giving before the coroner might be used against him as an admission at the trial, nor does it appear that he was so advised by any one. The state, through its coroner, was conducting the holding of this inquest. It was presided over by a justice of the peace, who presumably must have known that defendant, then in charge of the officer as a prisoner and under suspicion, should have been informed as to his legal rights in case he testified under such circumstances. We are of the opinion that defendant did not voluntarily appear as a witness before the coroner with knowledge as to his constitutional rights, and that the foregoing testimony should have been excluded.' Loc. cit. 351.

"See also State v. Young, 119 Mo. 495, 24 S.W. 1038; State v. Bartley, supra; and State v. Conway, 348 Mo. 580, 154 S.W. 2d 128.

"Under the facts outlined above, we are of the opinion that this appellant did not voluntarily testify at the coroner's inquest and that the court erred in admitting this testimony on cross-examination of the appellant."

The presence of an attorney at a coroner's inquest to counsel his client should in no way disrupt the orderly proceedings of the inquest so long as such counseling is restricted to advice given to the client, and it is not believed that such counseling constitutes a participation in the inquest such as is prohibited by the cases heretofore cited in this opinion.

Honorable Philip A. Grimes

CONCLUSION

It is the opinion of this department that witnesses subpoenaed to testify at a coroner's inquest are entitled to be counseled by their attorney so long as such counseling is restricted to advising the client as to his right to refuse to answer any question that might tend to incriminate him, but that such witness or his attorney is prohibited from taking any further part in the inquest by means of cross-examination of other witnesses appearing thereat.

Respectfully submitted,

JULIAN L. O'MALLEY,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:ba

COUNTY TREASURERS: The office of city attorney in a third class city when the duties of that office are limited by city ordinance to the prosecution of cases in police court is not incompatible with the office of county treasurer in a third class county.

January 29, 1951

Honorable Lane Harlan
Prosecuting Attorney
Boonville, Missouri



Dear Mr. Harlan:

We have your recent letter in which you request an opinion of this department. Your letter is, in part, as follows:

"On November 7, 1950, Thomas G. Woolsey was elected to the office of Treasurer of Cooper County, Missouri. At the time of his election and at the present time, after he has assumed his obligations of the office of treasurer, he was the duly elected city attorney of Boonville, Missouri. I would appreciate an opinion from your office, as to whether or not the two offices are incompatible so that they cannot be held by the same individual.

"If my views may be of assistance to you, I do not believe that the offices are necessarily incompatible. It may be well to state at this point that the sole duty of the City Attorney is to prosecute cases in Police Court. Other legal business and appeals from the Police Court to the Circuit Court are handled by the City Counsellor. * * *"

From your above quoted letter we deduce the fact that Mr. Thomas G. Woolsey as city attorney of Boonville has no duties other than that of prosecuting cases in Police Court, the duties ordinarily performed by city attorneys being within the scope of the duties of the City Counsellor. The City of Boonville is a third class city.

Section 98.330, RSMo. 1949, prescribes the duties of city attorneys in cities of the third class which duties are much

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more numerous than you indicate are the duties of the city attorney of Boonville, Missouri.

However, Section 98.340, RSMo. 1949, provides as follows:

"In any suit or action at law or in equity brought by or against the city except in prosecutions begun before the police judge, the city council may, by resolution, employ an attorney or attorneys, and pay him or them a reasonable fee therefor; provided, that any city may, by ordinance, provide for the office of city counselor and his duties and compensation. Such city counselor when so provided for, shall represent the city in all cases in all courts of record in this state; shall draft all ordinances and contracts and all legal forms of every kind, and give legal advice to the council and other officers of the city, and perform such other duties as shall be prescribed by ordinance or shall be ordered by the council or the mayor. In any city where there is a city counselor, the duties of the city attorney shall be such as may be prescribed by ordinance." (6924, A. 1949 H.B. 2045)

We are of the opinion that, under the provisions of the above quoted section, the City Council of Boonville has the right to provide by ordinance for the office of city counselor. In the event that it does so it has the right to provide by ordinance that all of the duties ordinarily required of the city attorney, with the exception of the duty of prosecuting cases in police court, shall be performed by the city counselor. We are of the further opinion that if, under said sections, it has so transferred the duties ordinarily performed by the city attorney to the city counselor it has the further right to enact an ordinance defining the duties of the city attorney. With the above mentioned powers of the City Council in mind and also bearing in mind your aforesaid statement that the duties of the city attorney of Boonville are limited to the prosecution of cases in police court, we believe that we are warranted in assuming that the City Council of Boonville has by ordinance limited the duties of the city attorney to prosecutions in police court and that you have in your letter correctly stated the duties of the city attorney. Our opinion shall therefore be predicated upon this assumption.

The question before us, therefore, seems to be whether or not the performance of the duties of the office of the city attorney of Boonville, a third class city, whose duties are limited to

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prosecution of cases in police court is incompatible with the performance of the duties of county treasurer of Cooper County, a county of the third class.

The duties of the city attorney of Boonville have been hereinabove discussed and we find no sections of the Missouri statutes specifically enumerating all of the duties of the county treasurer. We do find however that different sections impose different duties upon him and all of these duties pertain to the care of the public money of the county and of school districts, etc.

Section 54.040 RSMo. 1949, provides as follows:

"No sheriff, marshal, clerk or collector, or the deputy of any such officer, shall be eligible to the office of treasurer of any county."

The last above quoted section seems to be the only specific limitation as to eligibility for the office of county treasurer based upon the occupancy of other official positions.

We are of the opinion that since there is no law forbidding the holding of two public offices at the same time by the same person which is applicable to the offices of a city attorney, who has the limited duties above mentioned, and county treasurer and since there is no apparent conflict between the work of prosecuting cases in police court and the work of a county treasurer it is legal for Mr. Woolsey having been duly elected to each office to occupy them both. In this connection we quote as follows from the opinion of State ex rel. Walker v. Bus, 135 Mo. 325, l.c. 338, 339;

"* * *At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control or assist him.

"It was said by Judge Folger in People ex rel. v Green, 58 N.Y. loc. cit. 304; 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The

Hon. Lane Harlan

force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law."

We are of the opinion that the common law principle set forth in the above quotation to the effect that there must be conflict between the duties of the two offices involved before incompatibility exists is entirely applicable to the offices of city attorney of Boonville, Missouri and county treasurer of Cooper County as the duties of those offices have been above defined.


CONCLUSION

We are accordingly of the opinion that Mr. Thomas G. Woolsey having been duly elected city attorney of Boonville, Missouri and having been duly elected treasurer of Cooper County, may occupy both of these offices for the respective terms thereof.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

SMW:mw

APPROPRIATIONS:

STATE COUNCIL OF DEFENSE:

Appropriation to Council of Defense to be expended by council acting in a body in its official capacity. Division of Civil Defense cannot expend balance of appropriation to State Council of Defense.

February 28, 1951

3/1/51

Mr. Ralph W. Hammond
Director,
Office of Civil Defense
Jefferson City, Missouri



Dear Sir:

We are in receipt of your recent letter requesting an official opinion of this department, which letter reads in part as follows:

"I would like very much to request an official opinion on an appropriation matter now pending before the Legislature. As you are aware, the Emergency Appropriations Bill for state departments for the period, 1 January to 30 June, 1951, known as House Bill #1, has been passed by the House of Representatives and is now pending in the Senate. This bill contains an appropriation of \$75,000.00 for the State Council of Defense, for use in establishing a state-wide Civil Defense Program. Also pending in the Senate is Senate Bill #66, an enabling act creating a Division of Civil Defense.

"I would like your opinion as to whether any monies appropriated to the State Council of Defense by House Bill #1 could be expended, should a Division of Civil Defense be created prior to 30 June, 1951. For that matter, does my appointment by the Governor as Chairman of the State Council of Defense enable me to expend money duly appropriated for the State Office of Civil Defense, including funds for equipment, salaries, and supplies. In the event that I may obligate such funds under

Mr. Ralph W. Hammond

existing statutes (26.100, 26.110, and 26.120--Revised Statutes of Missouri 1949), would I be able to utilize any unexpended balance, should Senate Bill #66 be passed, creating a Division of Civil Defense.* * *

I.

As we interpret your opinion request, the first question to be answered is whether or not you, by virtue of your appointment by the Governor as Chairman of the State Council of Defense, are authorized to expend funds appropriated by the Legislature for the use of the State Council of Defense.

Section 2 of House Bill No. 1 of the present, the 66th General Assembly, reads as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Seventy-five Thousand Dollars (\$75,000.00) or so much thereof as may be necessary, for the use of the State Council of Defense, created by Act of the General Assembly (Laws 1941, Page 669), to pay the expenses of civilian defense, including salaries, wages, postage, rent, telegraph, telephone, express, freight, traveling expenses, stenographers, janitors, cost of supplies for emergency Medical Service, Fire Protection, Police, Air Raid Wardens, Emergency Public Utilities, Industrial Plant and Personnel Protection, Air Raid Warning Service, Aircraft Warning Service, purchase of films, purchase and rental of motor car equipment, office equipment, printing, stationery, Federal Old-Age and Survivors Insurance, and for all other purposes necessary to the operation of the State Council of Defense and its services for the period beginning January 3, 1951 and ending June 30, 1951."

Sections 26.110 and 26.120, RSMo. 1949, are the only statutory provisions providing for and regarding the State Council of Defense. Section 26.110 provides:

Mr. Ralph W. Hammond

"The governor is hereby authorized and empowered in time of emergency or public need in the nation or the state to create by proclamation a state council of defense, hereinafter designated as 'the council', for the general purpose of assisting in the coordination of the state and local activities related to national and state defense. Whenever he deems it expedient, the governor may, by proclamation, dissolve or suspend such council or reestablish it after any such dissolution or suspension."

Section 26.120 provides:

"The council shall consist of not less than fifteen members appointed by and holding office during the pleasure of the governor. The governor shall serve as chairman of the council. He shall designate one of the members of the council as vice chairman. Appointment of members shall be made without reference to political affiliation and with reference to their special knowledge of industry, agriculture, consumer protection, labor, education, health, welfare, or other subjects relating to national or state defense."

In the first place, Section 26.120, supra, expressly and specifically provides that "the governor shall serve as chairman of the council." The legislature has imposed this duty upon the governor and has in no way provided for or authorized the delegation of this duty to another by the governor. In view of this, it must be concluded that you cannot legally act as Chairman of the State Council of Defense.

The governor is authorized by the State Council of Defense Act to create the council and also to designate one of the members of such as vice chairman. The only operational and functional authority provided for by the Act is given to the council which authority is "for the general purpose of assisting in the coordination of the state and local activities related to national and state defense."

Mr. Ralph W. Hammond

Regarding the exercise of authority by a council, which is similar to a board or commission, the following was stated in the case of State v. Kelly 21 A.L.R. 156, 1.c. 170, 202 P. 524, 27 N.M. 412:

"It is argued, and correctly, that, where a duty is intrusted to a board composed of different individuals, that board can act officially only as such, in convened session, with the members, or a quorum thereof, present.* * *"

And in New England Box Co., v. C. & R. Constr. Co., 150 A.L.R. 152, 1.c. 156, 49 N. E. (2d) 121, 313 Mass. 696, the court stated:

"* * * It is a general rule that a board of public officers should act jointly and that all should have an opportunity to participate in their action, Pettengell v. Alcoholic Beverages Control Commission, 295 Mass 473, 477, 4 N. E. (2d) 324, although the joint authority of a commission may be exercised by a majority. GL (Ter. Ed.) c4, Sec. 6, Fifth. Real Properties, Inc. v. Board of Appeal of Boston, 311 Mass. 430, 433-435, 42 N.E. (2d) 499. The members of a public board cannot act separately as individuals. Carbone, Inc., v. Kelly, 289 Mass. 602, 605, 194 N. E. 701. * * *"

The only operational and functional authority vested by the State Council of Defense Act is given to the council. This authority can therefore be exercised only by the council and it must be exercised by the council acting as a body in its official capacity. This conclusion is in harmony with an official opinion rendered by this department under date of January 15, 1942, to the Honorable Hugh Stephens, who then held the title of Administrator of the Missouri State Council of Defense.

Section 2 of House Bill No. 1, supra, appropriates a certain sum for the use of the State Council of Defense for a number of enumerated purposes. It is to the State Council of Defense that this money is appropriated, and since the

Mr. Ralph W. Hammond

functional authority of the Act is vested exclusively in the Council, this appropriation can be utilized only by the Council acting as a body in an official capacity. Furthermore, the authority vested in the Council by the Act is "for the general purpose of assisting in the coordination of the state and local activities related to national and state defense." It is only for this purpose and the exercise of this authority that money appropriated by Section 2 of House Bill No. 1, supra, can be expended. An appropriation act cannot include general legislation enlarging the scope of authority of the agency for which the appropriation is made. This rule and the reason therefor is stated by the court in the case of *State ex rel. v. Canada*, 113 S.W. (2d) 783, 1.c.790, 342 Mo. 121, as follows:

** * This statute cannot be repealed or amended except by subsequent general legislation. Legislation of a general character cannot be included in an appropriation bill. To do so would violate section 28 of article 4 of the Constitution, which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no question but what the mere appropriation of money and the amendment of section 9622, a general statute granting certain authority to the board of curators, are two different and separate subjects. *State ex rel. Davis v. Smith*, 335 Mo. 1069, 75 S.W. 2d 828; *State ex rel. Hueller v. Thompson*, 316 Mo. 272, 289 S.W. 338. The valid and invalid portions of the statute are separable. If we disregard the invalid proviso, there is left a complete workable statute which appropriates the sum of \$10,000 for the purposes therein named. * * *

Therefore, in answer to your first question, we are of the opinion that you, as alleged Chairman of the State Council of Defense, are without authority to expend funds appropriated by the Legislature for the use of the State Council of Defense.

Mr. Ralph W. Hammond

II.

The appropriation provided for in Section 2 of House Bill No. 1, supra, is for a period ending June 30, 1951, Senate Bill No. 66 of the 66th General Assembly has been recently introduced in the legislature. This bill provides for the repeal of the State Council of Defense Act and the establishment of a Division of Civil Defense. The other question presented in your request is whether or not the Division of Civil Defense, should it be created prior to June 30, 1951, could expend prior to June 30, 1951, the balance of the fund appropriated by Section 2 of House Bill No. 1.

Regarding this question, a thorough search has revealed no authority directly in point. There is a line of decisions however which establish the rule that acts of the legislature which repeal and reenact pre-existing statutes is but a continuation of the latter and the law dates from the passage of the first statute. In *Brown v. Marshall et al.*, 145 S. W. 810, 1.c. 815, 241 Mo. 707, the court stated:

"(3) But, independent of that, there is another sound rule of statutory construction which governs this case, and that is a subsequent act of the Legislature repealing and re-enacting at the same time, a pre-existing statute, is but a continuation of the latter, and the law dates from the passage of the first statute and not the latter. *State ex rel. v. Mason*, 153 Mo. 23, 1.c. 58-59, 54 S. W. 524; *State ex rel. v. County Court*, 53 Mo. 128, 1.c. 129-130; *Smith v. People*, 47 N.Y. 330. We therefore rule this contention against the appellants."

Also in *State v. Ward*, 40 S.W. (2d) 1074, 1.c. 1078, 328 Mo. 658, it was held that:

"(10-11) III. The point that the repeal by the Fifty-fifth General Assembly in 1929 of Section 5596, R. S. 1919, and the enactment in lieu thereof of a new section to be known as section 5596 (Laws 1929, p. 217 (now Rev St. 1929 Sec. 8246), terminated the two year closed season voted by Harrison County in 1928, is without merit."

Mr. Ralph W. Hammond

From the foregoing, it might be argued that an act of the legislature repealing a former act establishing a certain agency, changing the name of the agency and including modifications which do not in effect change the nature, duties and operation of the former agency, can be considered a mere repeal and reenactment which is not in contemplation of law a repeal but rather an affirmance of the former statute whose provisions are continued without any intermission. It would then follow that the agency functioning under the new act could utilize the unexpended funds appropriated to the agency which operated under the old act, for in effect, they are the same agency.

However, even a cursory examination of the State Council of Defense Act and Senate Bill No. 66, the proposed Missouri Civil Defense Act of 1951, would reveal that the above theory would not be applicable here. The State Council of Defense was created and authorized "for the general purpose of assisting in the coordination of the state and local activities related to national and state defense." Senate Bill No. 66 provides for the establishment of a Division of Civil Defense. A council is provided for, but it serves only in an advisory capacity while the general control and supervision is to be exercised by the governor and director. We therefore see that the method of administration under the two acts is entirely different and unrelated. The authority and duties provided for by Senate Bill No. 66 are many and varied, giving the governor and director supervision and control over all civil defense activities in the state. It is also provided that upon the declaration of an emergency by the governor, he is given power which might be termed dictatorial in nature. We are of the opinion that Senate Bill No. 66 could in no way be considered a mere repeal and reenactment of the State Council of Defense Act which in legal effect would constitute an affirmance of the latter act and a mere continuation of its provisions.

Senate Bill No. 66 expressly repeals Sections 26.100, 26.110, and 26.120, R.S.Mo. 1949, the State Council of Defense Act. At the time Senate Bill No. 66 goes into effect, the State Council of Defense disappears, as also does the authority to expend what balance may remain from the fund appropriated by Section 2 of House Bill No. 1.

In view of the above, it is our opinion that the Division of Civil Defense, should it be established prior to June 30, 1951, cannot utilize the unexpended balance of the fund appropriated to the State Council of Defense.

Mr. Ralph W. Hammond

CONCLUSION

It is therefore the opinion of this department that the sum appropriated for the use of the State Council of Defense by Section 2 of House Bill No. 1 of the 66th General Assembly may be expended only by the State Council of Defense acting as a body in its official capacity.

It is further the opinion of this department that the proposed Division of Civil Defense, (Senate Bill No. 66, recently introduced in the 66th General Assembly), should it be established prior to June 30, 1951, cannot expend the balance of the fund appropriated for the use of the State Council of Defense for a period ending June 30, 1951.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RHV:ba

COUNTY COURT: County court in third class county has discretion
LICENSE: to refuse to issue license to keepers of billiard
tables.

March 16, 1951

FILED

37

3-19-51

Honorable Morran D. Harris
Prosecuting Attorney
St. Clair County
Osceola, Missouri

Dear Sir:

This will acknowledge receipt of your request for an
official opinion which reads:

"Application was made to the County Court
for license to operate a pool hall. A
hearing was had, after notice had been
published in a newspaper published in the
County Seat. At the hearing, no evidence
was submitted to the effect that (1) the
applicant was an unfit person to operate
such a business, or (2) that such business
would be run too near to a school or church.
The facts are that the applicant is a person
of the highest character and reputation,
and that the business would not be run
within 300 feet of any school or church.
The facts are, however, that the license
was refused without cause. The reason
given for refusing it was that a majority
of those at the hearing were opposed to
pool halls.

"It is my understanding, in the light of
Missouri cases, esp. 263 SW 807 and 227 SW
2d 80, that County Courts have no authority
to arbitrarily refuse to issue licenses for
pool halls or billiard halls, that said
Courts may use their discretion (i.e.,
refuse license for cause, such as unfitness
of applicant, or improper location of busi-
ness), but that dislike for pool halls in
general is not good cause in itself for
refusing such licenses. Is that the correct
interpretation of the laws of Missouri?

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"Applicant has obtained city license from the city of Osceola, and has applied for State and Federal license. He has said that he plans to operate a pool hall and at the same time place in the bank here to the credit of the County Court an amount equal to the maximum amount which the County Court could legally charge him for licenses, taking into account the number of pool tables he will operate. That would be operating without a county license. If my interpretation of the laws of Missouri is correct, as set out above, is there anything that I, as Prosecuting Attorney, can do about it, so long as the County Court gives no cause for refusing said license?"

Section 318.010, RSMo 1949, Chapter 318, relates to the power vested in the county court to license the keepers of billiard tables and reads:

"The county court shall have power to license the keepers of billiard tables, pigeonhole tables, jenny lind tables, and all other tables kept and used for gaming, upon which balls and cues are used. At each term, the clerk of said court shall prepare and deliver to the collector of their counties as many blank licenses for the keepers of such tables, herein mentioned, as the respective courts shall direct, which shall be signed by the clerk and attested by the seal of the court."

Section 318.020, RSMo 1949, requires the collector to deliver to any person licensed a license and further provides for the amount to be charged for said license depending upon the number and kind of tables, and reads:

"The collector shall deliver to any person who shall have been licensed, a license to keep any such table mentioned in section 318.010 in their respective counties, for a term of twelve months, upon the payment by the applicant of the sum of twenty dollars for each billiard table, and ten dollars for each other table described in said section, and the collector shall countersign such license before delivering

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the same to the applicant; provided, that if the applicant be the keeper of more than one of such tables, the number may be named in one license, and in such case the clerk shall not be entitled to more than one fee as provided in section 318.050."

Section 318.080, RSMo 1949, fixes a penalty for keeping tables mentioned in Section 318.010, supra, without first obtaining a license to keep them. Said section reads:

"Every person who shall keep or permit to be kept or used any one or more of the tables mentioned in section 318.010, without having a license therefor, shall forfeit and pay not less than fifty nor more than four hundred dollars, to be recovered by indictment or information."

Section 38 of Volume 53, Corpus Juris Secundum, pages 632 and 633, lays down the general principle of law relative to authority of licensing officials and reads in part:

"As a general rule the power vested in the board or officer to grant licenses on compliance by applicant with the prescribed conditions carries with it, either expressly or impliedly, the power to exercise a reasonable discretion in granting or refusing licenses, but under statutes mandatory in terms no discretion is vested in the licensing board or officer, and every person who possesses the statutory qualifications and who complies with the statutory requirements is entitled to a license, and under some statutes the board has no discretion except to determine whether applicant is a proper person to conduct the business. Whether the words of a licensing statute are mandatory or discretionary in providing for the issuance of a license is a matter of legislative intention to be determined by a consideration of the purposes sought to be accomplished by the statute."

From reading the foregoing statute, Section 318.010, supra, one would be inclined at first blush to conclude that the county court has no discretion in the matter upon the

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tendering to said court the amount charged for a license, since there are no requirements as to holding a hearing or qualifications of the applicant or any requirement that said license must not issue when the tables are located within a certain proximity of schools and churches and other similar provisions and conditions for issuing such a license. Such was more or less the holding of both the Kansas City and Springfield Courts of Appeals. (State ex rel. Bayless v. County Court, 193 Mo. App. 373, 185 S.W. 1149; and State ex rel. Oetker v. Johnson, 211 S.W. 682.)

However, in State ex rel. Hawkins v. Harris, 239 S.W. 564, the Springfield Court of Appeals held contrary thereto and held that as that court read Section 9644 (same as Section 318.010, supra) the county court has the right to refuse a license without giving any reason whatsoever. In so holding, the court said, l.c. 565:

"We have come to the conclusion that both of these decisions were erroneous, and our reasons for such conclusion will be hereinafter stated. The application of the law, as declared in those cases, would not require that we order the county court to issue the license in this case. The reason for this last statement is that in those cases it was shown that the county court did not find any evidence which would justify it to refuse the license on account of unsuitable man or place, while there is evidence in this case bearing on the suitability of the place, and the county court, passing upon that evidence, has found that it was unsuitable and objectionable. The right to try that question is vested solely in the county courts, and even should a county court base its conclusions upon evidence such as this court could not reach the same conclusion, still there is no power under the law or right given to this court to usurp that function which by statute is delegated to the county court. This phase of the law has been clearly set forth by the Kansas City Court of Appeals in the case of State ex rel. v. Thornhill, 174 Mo. App. 469, 160 S.W. 558, wherein the Supreme Court and appellate court cases are learnedly discussed, and wherein it is expressly held that:

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"It is only when the county court refuses to hear the application, or when it has found in relator's favor every fact necessary to the granting of the license, and yet refuses to issue the license, that mandamus will lie."

"That case and the cases cited therein clearly support the rule, and further hold that if the county court does undertake to hear evidence on the question, where the statute gives them the right to act, and makes an adverse finding, mandamus will not lie merely because the evidence would not support the finding, or that the court has made erroneous deductions from the evidence before it, and it is held in that case, and cases cited, that the only remedy which would ever be available to one who had been adversely ruled against by the county court would be a bill in equity charging fraud. Under authority of the Thornhill Case, the county court in the case at bar having heard evidence and found the facts under that evidence, this court cannot, by mandamus, correct that finding and require that court to issue the license; otherwise, the appellate court would be assuming the authority which has been solely delegated to the county court.

"But there are other reasons, which to our minds are greater than these, that would prevent this court from ordering the county court to grant the license, and that is because, as we read the statute (section 9644), the county court has the right under that law to refuse a license without giving any reason whatever. The statute itself merely provides that 'the county court shall have power to license the keepers of billiard tables.' There is no intimation in the statute that this power shall be exercised in a mandatory way. We say this because there is no provision made, in the statute with reference to the granting of pool and billiard licenses, for a hearing before the county court; there is no provision made for remonstrance to be filed; there is nothing in the statute which appears to us directing that the county court shall do anything in connection with an application filed before it."

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The foregoing case was thereafter certified by the Springfield Court of Appeals to the Supreme Court of Missouri for final determination for the reason that there was a direct conflict with that decision and one of the Kansas City Court of Appeal decisions. The Supreme Court decision, reported in 304 Mo. 309, 263 S.W. 807, affirmed the decision of the Springfield Court of Appeals and in so holding, the Supreme Court said, l.c. 808:

"The majority opinion of the Court of Appeals, while holding that the petition of relator was deniable upon the ground that respondents had taken evidence, and made a finding thereon, and had not abused its discretionary power in the instant case, a conclusion in which we concur, went farther, and sustained the action of respondents upon the ground that county courts have 'the exclusive right, acting under section 9644, R. S. 1919, to grant or refuse billiard or pool room licenses, without basing their conclusion on anything other than that they may determine that such an institution in a community is a nuisance.' That holding being in conflict with the decisions of the Kansas City Court of Appeals in State ex rel. v. County Court of Clinton County, 193 Mo. App. 373, 185 S.W. 1149, and State ex rel. v. Johnson, 211 S.W. 682, the cause is certified to this court.

* * * * *

"The occupation of keeper of billiard and pool tables is one which has never been permitted to be exercised except a license therefor be granted by the county court. The power to grant the license has always been vested in the county court, and without the laying down of any conditions under which, or in accordance with which, the power shall be exercised, other than the provision fixing the amount to be paid upon each table, and the provision forbidding county courts and city authorities from levying a greater amount on any table than is allowed for state purposes.

* * * * *

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"It is clear that the primary license to keep pool or billiard tables is the license to be obtained from the county court. * * * The power given to the county court is not of a regulatory character. * * * * * There is nothing in the terms mandatory upon the county court in the language of section 9644. There is nothing prescribing the qualifications of the applicant nor the character of the place where the tables are to be kept. No provision is made for a petition by him setting forth anything, nor for petitioners whom he must secure as a prerequisite, nor for a remonstrance from any one opposed to the granting of license, nor any provision for the taking of evidence by the county court. In construing the language used in section 9644, a comparison of that section with the statute formerly in force, providing for license to keepers of dramshops with the ruling of this court upon the latter, is pertinent. Under the statute of 1865, G. S. 1865, c. 98, there were certain requirements made as to the application, and the statements therein to be made and shown. After which there was a provision as follows: 'And if the court shall be of the opinion that the applicant is a person of good moral character, the court may grant a license for six months.' The question of the force to be given to this language came up in the mandamus proceeding in State ex rel. Kyger v. Justices of Holt County, 39 Mo. 521. In that case the contention of the relator was that, since he filled the requirements, and had complied with all of the conditions prescribed by the statute, the county court had no discretionary power in the premises, and the license must be granted as a matter of right. It was held that, since the business was one which the Legislature had not prohibited, but allowed to be exercised by certain persons, having qualifications specified by the law, it then became a 'municipal privilege.' It was said (loc. cit. 524):

"The business, then, which the retailer seeks to engage in is not a matter of personal right, nor one that the interests of

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the public at large demands that he should be permitted to carry on.'

"It was held that the county court was fully vested with discretionary powers, and might exercise the same, 'subject to the limitations and restrictions absolutely imposed by statute.' This ruling upon the force and meaning of the words, 'the court may grant a license,' was followed thereafter. * * * "

State ex rel. Hawkins v. Harris, supra, seems to be the last word of the Supreme Court in this state construing such statutes, and, therefore, is the law of Missouri.

You refer to the case of City of Meadville v. Caselman, 227 S.W. (2d) 77, as a possible authority for holding that the county court has no discretion in the matter. In that case the Kansas City Court of Appeals discussed at length many Missouri decisions. The city had duly passed an ordinance prohibiting the using, keeping or maintaining pool tables for pay or profit in said city. At the time there was a general statute, Section 7196, RSMo 1939, which provided that the mayor and board of aldermen shall have power and authority to regulate and to license and levy and collect a license tax on billiard and pool tables and other gaming tables and to license, tax, regulate or suppress the operation of billiard tables, pool and other gaming tables. There was also a statute, Section 7442, RSMo 1939, which provided that ordinances must conform with the state law. The above ordinance was in direct violation of its foregoing statutes. After discussing laws pertinent to licensing pool halls in various cities of Missouri, it concluded that villages and certain cities were given the power to prohibit the operation of pool halls under other specific statutes, but no such authority had been conferred upon cities of the fourth class under the statutes in full force and effect at that time, which we have referred to hereinabove.

CONCLUSION

It is the opinion of this department that the county court in this instance had discretion under State ex rel.

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Hawkins v. Harris, supra, to refuse to grant said license notwithstanding the good reputation of the applicant and the premises on which said tables would be located, not being in close proximity to any school or church.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

ARH:VLM

CHANGE OF NAME) A court order changing the name of a father does
VITAL STATISTICS) not automatically change the name of his children
and may not be accepted by the Bureau of Vital
Statistics as sole basis for amending birth records
of such children.

March 22, 1951

3-23-51



Buford G. Hamilton, M.D.
Director
Division of Health
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for an opinion
on questions as follows:

"1. Does the court order changing
the surname of the father of a
legitimate child apply also to the
surname of the child?

"2. Can the Bureau of Vital Statis-
tics accept a court order changing
the father's surname as a basis for
amending the surnames of children who
have birth records filed in our office?"

We are unable to find any case directly in point on
the questions contained in your request. We are, there-
fore, forced to resort to general principles of law and
rules of construction of statutes.

The statutory provision for making application to a
court for changing names is Section 527.270, RSMo 1949,
and is as follows:

"Hereafter every person desiring
to change his or her name may
present a petition to that effect,
verified by affidavit, to the
circuit court in the county of the
petitioner's residence, which
petition shall set forth the

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petitioner's full name, the new name desired, and a concise statement of the reason for such desired change; and it shall be the duty of the judge of such court to order such change to be made, and spread upon the records of the court, in proper form, if such judge is satisfied that the desired change would be proper and not detrimental to the interests of any other person."

(Emphasis ours.)

At common law an individual could lawfully change his name without resorting to any legal proceedings, and it has generally been held in this country that statutory provisions for the changing of a name are not exclusive and do not abrogate the common law but are only in affirmation thereof. The court had this to say in the case of *Reinken v. Reinken*, 184 N.E. 639, 1. c. 640:

"* * * At common law, and in the absence of statutory restriction, an individual may lawfully change his name without resort to any legal proceedings, and for all purposes the name thus assumed will constitute his legal name just as much as if he had borne it from birth. 45 Corpus Juris 381. Our 'act to revise the law in relation to names' (Smith-Hurd Rev. St. 1931, c. 96, Cahill's Rev. St. 1931, c. 96) permits an individual to apply to the circuit court for the entry of an order changing his name. These statutory provisions are, however, not exclusive, but are merely permissive, and they do not abrogate the common-law right of the individual to change his name without application to the courts. 45 Corpus Juris, 381, 382, and authorities there cited. * * *"

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On the subject of construing statutes to which, we must resort, the Supreme Court of Missouri in the recent case of Donnelly Garment Co. v. Keitel, 193 S.W. (2d) 577, 1. c. 581, said:

" * * * And a primary rule of construction of a statute is to ascertain from the language used the intent of the lawmakers if possible, and to put upon the language its plain and rational meaning in order to promote the object and purpose of the statute. Haynes v. Unemployment Compensation Commission, supra, 183 S.W. 2d loc. cit. 81, and cases there cited."

Another cardinal rule of construction of statutes is found in State ex rel. v. McKay, et al., 52 S.W. (2d) 229, 1. c. 230, where the court said:

"In Johnston v. Ragan, 265 Mo. 420, 435, 178 S.W. 159, 163, it is said: 'Statutes are not to be construed so as to result in an absurdity or to impose unnecessary burdens.'"

Changing the name of the father of a child by order of court is and should be a matter of vital interest and importance to first, the petitioner; second, the wife of petitioner; and third, petitioner's children.

From an examination of the authorities generally, it seems to have been at common law a personal privilege for a person so desiring to change his name. All that was necessary at common law was for an individual to have the desire to change his name and proceed in his daily duties to go under the desired name. At common law this was done without legal proceedings and may still be done in most states. However, the statutes of some states expressly prohibit the change of name of an individual by common law. Missouri apparently is not one of such states.

We find no authority stating that the change of name of a parent will change the name of the child of such

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parent. Before the name of an individual can or should be changed, there should be a desire on the part of the individual that his name be changed, and he certainly should have something to say about what the new name should be.

To aid in construing the change of name statutes, Sections 527.270, 527.280 and 527.290, RSMo 1949, we refer you to the adoption law on change of name. Here the Legislature carefully provided that when a child is to be adopted and a change of name is sought, it must be so stated in the petition, and the court may then decree that the name of the person adopted be changed as requested in the petition.

Section 453.020, RSMo 1949, under adoption law, provides for what shall be contained in the petition and among other things we find: " * * * and if it is desired to change the name of said person, the new name of said person. * * *"

In Section 453.080, RSMo 1949, of the adoption law we have the following:

" * * * and the court may decree that the name of the person sought to be adopted be changed, according to the prayer of the petition."

Under divorce laws of Missouri we find provision for changing the name of a wife obtaining a divorce. In Section 452.100, RSMo 1949, we find:

"When the wife shall obtain a divorce from the bonds of matrimony, * * * and the court, upon her request, shall make an order, changing her name to that of any former husband, or to her maiden name, as she may elect."

(Emphasis ours.)

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It clearly appears that the change of name both under the adoption laws and the divorce laws is carefully guarded by the Legislature. It will also be noted that before a wife's name in a divorce proceeding can be changed there must be a request on her part and a court order changing her name to that of a former husband or to her maiden name as she may elect.

Before a person's name can be changed under the provisions of Section 527.270, RSMo 1949, there must be a desire for the change on the part of the person whose name is to be changed. The beginning of the section is as follows:

"Hereafter every person desiring to change his or her name may present a petition to that effect, * * *."

(Emphasis ours.)

Said Section 527.270, RSMo 1949, further provides that the petition for change of name shall be filed in the county of petitioner's residence, and that the petitioner shall set forth the following: " * * * the petitioner's full name, the new name desired, and a concise statement of the reason for such desired change; * * *" Had the Legislature had in mind or intended that the names of the petitioner's children should also be changed on the mere change of the name of the father, it would certainly have required that the petition contain the names of his children, so that they would be notified and have an opportunity to protest a change of their name. The same reasoning would apply to the wife of petitioner. She should have a right to be heard in a

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proceeding where her name would also be automatically changed.

The law provides for no notice of the pendency of the proceeding to change the name of an individual either by printed notice, summons or otherwise to the interested parties such as members of the immediate family who on account of the close relationship should be vitally interested in the change of the name of a father, especially if such change would also change their names.

The only notice required in a statutory change of name proceeding is that notice be given at least three times by newspaper publication of the change of name of the petitioner within twenty days after the court order is made. Section 527.290, RSMo 1949, is as follows:

"Public notice of such a change of name shall be given at least three times in a newspaper published in the county where such person is residing, within twenty days after the order of court is made, and if no newspaper is published in his or any adjacent county, then such notice shall be given in a newspaper published in the city of St. Louis, or at the seat of government."

This section provides for notice of the change of name of the petitioner only. No notice is required in said Section 527.290, supra, for a change of name of petitioner's children.

Had the Legislature had in mind that a decree changing the name of the father would also change the name of his children, they would have provided for such change in the law. The Pennsylvania statutes on change of name provide that the minor children shall bear the changed name of the parent. This was done by their statutes, Purdon's Pennsylvania Statutes, Annotated, Title 54, Chapter 1, Section 4, which section is as follows to-wit:

"Whenever in pursuance of this act, a decree is made changing the name of anyone who is at the time thereof

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the parent of a minor child or children or adopted minor child or children, then under the care of such parent, the new name of such parent shall thereafter be borne likewise by such minor child or children or adopted minor child or children: Provided, That any minor child or children or adopted child, upon attaining their majority respectively, shall also be entitled to the benefits of this act."

Section 61-102, Chapter 61, Compiled Statutes of Nebraska, 1929, page 1265, is as follows:

"Any person desiring to change his or her name may file a petition in the district court of the county in which such person may be a resident, setting forth: First--that the petitioner has been a bona fide citizen of such county for at least one year prior to the filing of the petition; second--the cause for which the change of petitioner's name is sought; third--the name asked for. And it shall be the duty of the district court at any term thereof after the filing of said petition upon being duly satisfied, by proof in open court, of the truth of the allegations set forth in the petition, and that there exists proper and reasonable cause for changing the name of the petitioner, and that thirty days' previous notice of the intended application had been duly given in some newspaper printed in such county, or in case no newspaper be printed in the county, then in some newspaper in general circulation therein, to order and direct a change of name of such petitioner, and that an order for the purpose be made in the journals of the court."

In construing this statute In Re Tominosian, 97 Neb. Rep. 514, in a dissenting opinion, Sedgwick, J., made the following observation with reference to the Nebraska statute at l. c. 518:

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"The change of the husband's name does not necessarily change the name of his wife. See an article on this question in 18 Law Notes, p. 164, in which a case in the California court of appeals is cited, and other cases. * * * In the case at bar there is and can be no party named except the petitioner himself. No one is supposed to join issue with him. The majority opinion assumes that the wife and children are specially interested. If so, there should be a provision for making them parties, or at least for allowing them to appear and defend."

(Emphasis ours.)

A man's name is given to him when he is born, and it should so remain until he sees fit to change the name by common law or statutory proceeding. In *Laflin & Rand Company v. Steytler*, 146 Pa. St. Rep. 434, at l. c. 442, Mr. Justice Mitchell, speaking for the court, said:

"* * * A man's name is the designation by which he is distinctively known in the community. Custom gives him the family name of his father, and such praenomina as his parents choose to put before it, and appropriate circumstances may require Sr. or Jr. as a further constituent part. But all this is only a general rule from which the individual may depart if he chooses. The legislature in 1852 provided a mode of changing the name, but that act was in affirmance and aid of the common law, to make a definite point of time at which a change shall take effect. But without the aid of that act a man may change his name or names, first or last, and when his neighbors and the community have acquiesced and recognized him by his new designation, that becomes his name. * * *

(Emphasis ours.)

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Our principle reason for answering question number one in the negative is that the Statutes of Missouri do not provide for the change of name of anyone other than the petitioner. An absurd result would arise where a husband changed his surname by statute and the wife and children protested and objected to the change, and upon the decree being entered changing the name of the petitioner, the wife and children could by common law immediately change their names back to their original name. Under such circumstances it would be difficult to determine the name on any particular day of any members of the petitioner's family.

On the subject of the wife changing her name by common law to a name different to that of her husband in 18 Law Notes at page 164 we find the following:

"Some observations on names in their legal aspect are evoked by the report of a puzzling question that has been brought before the California Court of Appeals. It appears that a certain Mrs. White, a law student, who was formerly Mrs. Smith, has applied for admission to the bar under the name of Emma S. Smith. She has been told that she must reapply under the name of her present husband. This she refuses to do, insisting that nowhere in the statutes is there a provision requiring any woman to accept her husband's name; that it is simply a custom, and that she prefers to keep the name which she had prior to her marriage to White. So far as our investigations have gone, Mrs. White, or Smith, appears to be well within her rights. The law has been very liberal toward individuals in the matter of their names. At common law a man may change his name at will and sue or be sued in any name by which he is known and recognized. Linton v. First Nat. Bank, 10 Fed. 894. 'A man's name,' says the court in Laflin & Rand Powder Co. v. Steytler, 146 Pa. St. 434, 'is the designation by which he

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is distinctively known in the community.' * * *

* * * * *

"In view of all the foregoing it would seem that our legal neophyte in California should have an unimpeachable right to take the name of Smith, although her husband's name is White. * * * Mrs. White has chosen to be Mrs. Smith and that the name of Smith shall bear the honors of her future forensic triumphs. And Smith let it be, say we."

Let us assume a minor is twenty years old and his father obtains a statutory change of name. Would that child be deprived of his name without his knowledge or consent? We say "No." The child should have his day in court, an opportunity to be heard, to consent or protest, according to his desire in the proceeding which would automatically change his name. He has spent twenty years, his entire life, building a good reputation, and the foundation for that good reputation is his name, and a court certainly would have no authority to deprive him of his name and his reputation built upon the name without his knowledge and consent.

Change of name both by common law and by statute is based on the desire and consent of the party whose name is to be changed.

It is our opinion that the mere order or decree of court changing the surname of the father of a legitimate child shall not apply to or change the surname of his child.

In answer to your second question it is our opinion that the Bureau of Vital Statistics would not be justified in accepting a court order changing the father's name as the sole basis for amending the surname of the children who have birth records filed in its office.

CONCLUSION

Therefore, it is the conclusion of this department that when a court order is entered changing the name of a father


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of a legitimate child, minor or adult, such change of name shall not apply to the child and such court order may not be accepted by the Bureau of Vital Statistics as the sole basis for amending the surname of the children who have birth records filed in its office.

Respectfully submitted,

APPROVED:

GROVER C. HUSTON
Assistant Attorney General



J. E. TAYLOR
Attorney General

GCH/fh

MOTOR VEHICLES:
CERTIFICATE OF TITLE:

A person selling in Missouri, a motor vehicle not registered under the laws of this state, to which motor vehicle the seller passes to the buyer no evidences of title, does not violate subsection 4 of Section 301.210, RSMo 1949.

May 8, 1951

5-8-51



Colonel David E. Harrison, Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

My dear Colonel Harrison:

Your recent letter to the Attorney General requesting an official opinion has been assigned to me to answer. You thus state your opinion request:

"We have been requested by one of our troop commanders to obtain an opinion on the following matter:

"A former resident of the State of Iowa, now living in the State of Missouri, brought into this State a car registered in the State of Iowa and subsequently sold the vehicle to a citizen but failed to deliver to him a proper title. As a result the purchaser was unable to register the vehicle in this State and he asked the Patrol to assist him in obtaining the title. This department arrested the seller and charged him with unlawful sale of a motor vehicle under Section 301.210, paragraph 4, Statutes of Missouri, 1949. The case was dismissed on the grounds the law did not apply since the vehicle in question was not registered under the laws of the State of Missouri.

"We request that your department give us an opinion whether or not the law would apply in this particular case, and recommend to us what procedure should be followed in any case of this type in the future."

Subsequent to writing the above letter, you have supplemented the information contained therein by informing us orally that in the instant case the seller did not deliver to the buyer at the time of sale or at any time any title of any kind whatsoever.

Col. David E. Harrison

Sub-section 4 of Section 301.210, RSMo 1949, states:

"It shall be unlawful for any person to buy or sell in this state any motor vehicle or trailer registered under the laws of this state, unless at the time of the delivery thereof, there shall pass between the parties such certificate of ownership with an assignment thereof, as herein provided, and the sale of any motor vehicle or trailer registered under the laws of this state, without the assignment of such certificate of ownership, shall be fraudulent and void."

From the above it is clear that any person who, in this state, sells a motor vehicle registered under the laws of this state, without issuing to the buyer a certificate of ownership with an assignment thereof, violates sub-section 4 of Section 301.210, quoted above.

But the question which we have to answer here is: when a person in this state, sells a motor vehicle in this state, which motor vehicle is not registered under the laws of this state, but which is registered under the laws of another state, and the aforesaid seller does not give to the buyer at the time of sale, or at any time, any title whatsoever, is he in violation of sub-section 4 of Section 301.210, supra?

We believe that the answer to this question is in the negative. It will be observed that Section 301.210, supra, clearly states that it is to apply to any motor vehicle or trailer "registered under the laws of this state." Since the motor vehicle in the instant case was not registered under the laws of this state, we do not believe that the above section applies. If it had been the intent of the Legislature that the section quoted above should apply to such situations as you present, it certainly would not have limited its application to motor vehicles "registered under the laws of this state."

Only by a very strained construction, if at all, could Section 301.210, supra, be made applicable in the instant case. It is a well established principle of law in Missouri that criminal statutes are to be construed strictly against the state and liberally in favor of the defendant. In the case of State v. Dougherty, 216 S.W. 2d 467, 1.c. 471, the Court stated:

Col. David E. Harrison

"Criminal statutes are to be construed strictly; liberally in favor of the defendant, and strictly against the state, both as to the charge and the proof. No one is to be made subject to such statutes by implication.' State v. Bartley, 304 Mo. 58, 263 S.W. 95, 96; State v. Taylor, 345 Mo. 325, 133 S.W. 2d 336, 341."


CONCLUSION

It is the opinion of this department that one selling in Missouri a motor vehicle not registered under the laws of this state, to which motor vehicle the seller passes to the buyer no evidences of title, does not violate sub-section 4 of Section 301.210, RSMo 1949.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

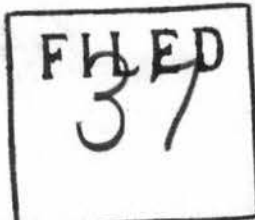


J. E. TAYLOR
Attorney General

HPWab

BASTARDS) A court order changing the name of the
) mother of an illegitimate child in no
CHANGE OF NAME) way affects the surname of such child.

May 15, 1951



5-15-51

Honorable Buford C. Hamilton, M.D.
Director, Division of Health
Jefferson City, Missouri

Dear Sir:

This is in response to your request for an opinion
on the following question, to-wit:

"Does a court order changing the
surname of the mother of an illegit-
imate child affect the surname of
that child?"

The statutory provision for changing a person's name
in Missouri is found in Section 527.270, RSMo 1949, and
is as follows, to-wit:

"Hereafter - every person desiring
to change his or her name may present
a petition to that effect, verified
by affidavit, to the circuit court in
the county of the petitioner's resi-
dence, which petition shall set forth
the petitioner's full name, the new
name desired, and a concise statement
of the reason for such desired change;
and it shall be the duty of the judge
of such court to order such change to
be made, and spread upon the records
of the court, in proper form, if such
judge is satisfied that the desired
change would be proper and not detri-
mental to the interests of any other
person."

Honorable Buford C. Hamilton, M.D.

It will be noted that this statute applies to every person desiring to change his or her name. By its very terms, it is all inclusive.

There are no cases in Missouri decisive of this question.

On March 22, 1951, this office rendered an opinion to you answering the following query: "Does a court order changing the surname of the father of a legitimate child apply also to the surname of the child?" Our reply was to the effect that a court order changing the name of a father of a legitimate child in no way affected the child's name. Since the statute makes no reference to legitimacy and is all inclusive, our answer to the present question is that a court order changing the surname of the mother of an illegitimate child in no way affects the surname of her child.

For further reasoning on the question here presented we refer you to our opinion given you on March 22, 1951, a copy of which is hereto attached and made a part of this opinion.


CONCLUSION

It is, therefore, our conclusion that a court order changing the surname of the mother of an illegitimate child in no way affects the surname of such child.

Respectfully submitted,

GROVER C. HUSTON
Assistant Attorney General

APPROVED:

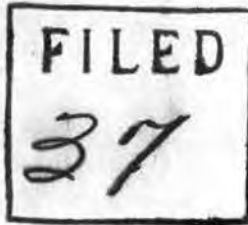


J. E. TAYLOR
Attorney General

GCH/fh

Enclosure

SCHOOLS: In election to vote on forming enlarged school district County Board of Education may designate
ELECTIONS: ~~only~~ one voting place. Majority vote of members of board of directors of receiving school district is all that is required to complete annexation of an adjoining district wherein the voters have voted for said annexation.



July 13, 1951

7-18-51

Honorable C. D. Hamilton
State Representative
New London, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department, which, in part, reads:

"Some men came to see me last night, asked that I write you regarding the following matter:

"Because of the redistricting of the schools, there has been a six man Board to supervise this matter. They decided to close all voting precincts, leaving one open, Perry. They state Greenlawn and Hutchinson has always been open to the public for voting purposes. They state, not only are they bitterly opposed to this action, but many in that community, and in these two precincts. They would like your opinion if they have a right to close free and open precincts.

"They would like to also know if the law is still in effect when it is necessary to vote themselves out of their district into another, then if it is right for that district to vote them into their district."

Pursuant to our request for additional information your letter of July 11 was received, which, in part, reads:

"The type of election is - there is, or has been a movement to merge many of the country schools into one district, this election is to vote for this to be done. Many of the

Honorable C. D. Hamilton

country schools are not in favor, so what they wanted to know is whether or not this six man Board elected to supervise all of the needs of the county had authority to close all precincts except Perry. These men decided it was cheaper to have one precinct, however these country people want to vote in the precincts where they have always voted. This Board has ordered all precincts closed, compelling all to go to Perry to vote. They are anxious for this to be defeated, feel there may be certain influences used to persuade people to vote a certain way. Plainly, what they want to know as to the second paragraph of my letter is, 'Is it against the law for these precincts to be closed, and, does this Board have the powers to do it?'

"The third paragraph you have the right interpretation - Is it legal for school districts to vote to become annexed to another district, then would the school district receiving this annexed district or districts have to receive them by vote on their part."

In connection with your first question we assume that the six-man board to which you refer is the County Board of Education, and we further assume that the type of election to which you refer is an election called by the County Board of Education to vote upon the proposition of forming an enlarged school district within the county.

Hereinafter the statute references appearing in this opinion will be those contained in the Revised Statutes of 1949.

Section 165.657 provides for the formation of a County Board of Education and for the subsequent election of members thereof. The statute reads as follows:

"There is hereby created in each county of Missouri a 'County Board of Education.' Within sixty days after sections 165.657 to 165.707 take effect each county superintendent shall call a meeting of the members of the boards of education and boards of directors of the various school districts in his county in accordance with the provisions of sections 165.033 and 167.110, RSMo

1949. The meeting shall organize by the election of one of its members as chairman. The county superintendent of schools shall serve as secretary of the meeting. Each member of every school board within the county shall be entitled to one vote.

"When organized as above provided the meeting shall proceed to elect a county board of education of six members. Initially two members shall be elected for a term to expire on the second Tuesday of April, 1952, two for a term to expire on the second Tuesday of April, 1951, and two for a term to expire on the second Tuesday of April, 1950. After the expiration of the initial terms, members elected shall serve for terms of three years. Each person so elected shall be a citizen of the United States and of the state of Missouri, a resident householder of the county, and shall be not less than twenty-four years of age. Not more than three members of such board shall reside in any county court district and not more than one member of said board shall be chosen from the same municipal township or school district, except that if there be less than three municipal townships or school districts in any county court district, such district shall have as many members of the board as it may contain municipal townships or school districts and the remainder of such board shall be elected at large but shall reside in said county court district.

"In 1949 and annually thereafter each county superintendent of schools shall call a meeting of the members of the boards of education and boards of directors of the various school districts in his county in accordance with the provisions of sections 165.033 and 167.110, RSMo 1949, to be held at ten o'clock a.m. on the second Tuesday in April, and such meeting shall fill all existing vacancies in the county board of education.

"In the election of the first county board, nominations shall first be made from the floor to fill one of the longest terms, and each

Honorable C. D. Hamilton

office to be filled shall be voted upon separately. Election of each board member shall be by majority vote by ballot."

Under Section 165.673 the County Board of Education is required to make a comprehensive study of the school districts of the county and prepare a plan of reorganization. After its completion the plan of reorganization must be submitted by the County Board of Education to the State Board of Education for examination and approval.

Thereafter, an election must be held to vote upon the proposition of forming proposed enlarged school districts as contained in the reorganization plan approved by the State Board of Education. Thus Section 165.680, in part, provides:

"Within sixty days after receipt of approval by the state board of education of the reorganization plan, the secretary of the county board of education shall call an election in each proposed enlarged school district that lies wholly within the county or has been designated by the state board of education as belonging to the county. The notices of such election shall be by written or printed notices, signed by the president and secretary of the county board of education. Such notices shall be posted in at least three public places within each school district affected by the proposal and shall also be published at least two times in at least one newspaper of general circulation in the county or counties affected by said proposed enlarged district, the last published notice not less than six days prior to the date of election. The county board of education shall select and designate the voting place or places in each proposed enlarged school district and shall, also, select and appoint three judges and two clerks of such elections for each polling place, all such persons to be residents of the proposed enlarged school district. * * * All qualified voters resident in the proposed enlarged school district shall have the right to cast their ballots for or against the proposal. The ballot shall be in the following form:

Honorable C. D. Hamilton

- ☐ For the proposed enlarged district
- ☐ Against the proposed enlarged district

Check with cross mark (X) in the square desired.

The judges and clerks of the election shall certify to the secretary of the county board of education the total votes for and the total votes against the proposed enlarged district. A majority affirmative vote of the total votes cast shall be required for adoption of the proposed enlarged district."
(Emphasis ours.)

As we read your first question, you desire to know the number of voting places which must be established in a proposed enlarged school district at the time the election is held, as provided for in the above section.

In this connection your attention is directed to the underscored portion of the above-quoted statute, which vests the authority in the County Board of Education to select and designate the voting place or places in each proposed enlarged district when the election is held. We believe the language of the statute is clear and unambiguous in giving this power to the County Board of Education, and under the statute said board has the power to designate one or several voting places. Consequently, in the election to which you refer we believe that the County Board of Education by law has the authority to select and designate only one voting place or precinct within the proposed enlarged district, the formation of which is voted on by the people residing therein.

In the case of *Armantrout v. Bohon*, 162 S.W. (2d) 867, the Supreme Court of Missouri was considering the validity of an election wherein the county superintendent of schools of Marion county was elected. The election had been attacked on the ground that the Hannibal School Board had only selected one voting place for the election. In ruling on the question the court, at l.c. 871, said:

Honorable C. D. Hamilton

" * * * The quoted statute (Sec. 10483, R.S. Mo. 1939, Mo. R.S.A. Sec. 10483) says the voting shall be 'at such convenient place or places * * * as the board may designate.' It may 'at the option of the board' be held at the same time and place as city elections are held in certain counties. But none of these provisions may be construed as mandatory. It does not appear that any city elections were being conducted at the time. There are times conceivably, when one voting place in Hannibal would be adequate for the submission of school matters to the voters of the district, although we doubt that to be the case when there is a contest over the office of county superintendent. But even so, we cannot say that the board's designation of only one voting place in that district was a violation of any mandatory provision of the law, even though it did not provide places easily accessible and convenient to the voters. The board may not have used the best judgment in selecting voting places but that only one place was designated, in this instance and under the circumstances, is not such an abuse of their discretion, or disregard of the election laws that the election may be invalidated for this reason. * * *"

Under the authority of the above case it might constitute an exercise of better judgment for the County Board of Education to select more than one voting place within the proposed enlarged district, but we believe that said board would have authority to select only one voting place.

In your second question you inquire about the action to be taken by a receiving school district when an adjoining school district has voted to become annexed to it.

In this connection your attention is directed to Section 165.300, which, in part, provides:

"Whenever an entire school district, or a part of a district, whether in either case it be a common school district, or a city, town or consolidated school district, which adjoins any city, town, consolidated or

Honorable C. D. Hamilton

village school district, including districts in cities of seventy-five thousand to five hundred thousand inhabitants, desires to be attached thereto for school purposes, upon the reception of a petition setting forth such fact and signed by ten qualified voters of such district, the board of directors thereof shall order a special meeting or special election for said purpose by giving notice as required by section 165.200; provided, however, that after the holding of any such special election, no other such special election shall be called within a period of two years thereafter.

"Should a majority of the votes cast favor such annexation, the secretary shall certify the fact, with a copy of the record, to the board of said district and to the board of said city, town or village school district; whereupon the board of such city, town or village district shall meet to consider the advisability of receiving such territory, and should a majority of all the members of said board favor such annexation, the boundary lines of such city or town school district shall from that date be changed so as to include said territory, and said board shall immediately notify the clerk of said district which has been annexed, in whole or in part, of its action. * * *"

You will note in reading the above section that, after the school district which desires to become annexed to an adjoining district has voted in favor of the annexation by a majority of the votes cast being in favor thereof, the secretary of the annexing school district must then certify such fact to the board of directors of the adjoining school district. Thereafter, the board of directors of the adjoining or receiving school district must meet to consider the advisability of receiving the school district which has voted to annex to the receiving district, and only the members of the board vote on the annexation. No election is required to be held whereby the resident voters of the receiving school district would vote on the proposition of annexing the territory of the other school district.

If a majority of the members of the board of directors of the receiving school district vote in favor of the annexation the boundary lines of said school district are from that date changed

Honorable C. D. Hamilton

so as to include the new territory, and the clerk of the school district which has been annexed is notified of the action taken by the board of directors of the receiving school district.

In the case of State ex inf. Killam ex rel. Clare v. Consolidated School District No. 1 of Lincoln County, 209 S.W. 938, 277 Mo. 458, the annexation of a common school district to a consolidated school district was being attacked. In ruling upon one of the grounds upon which the annexation was being questioned the court held that the election of the board of directors of the receiving school district was proper, even though only four members were present where all six had been notified. Thus, at S.W. l.c. 940, 941, the court said:

"It is claimed by appellant that the meeting of the board of directors of consolidated school district No. 1 on March 23d, was not valid because only four of the six members of the board were present. There is evidence, however, tending to show that all members of the board were notified. The certificate from the clerk of the district, No. 37, was present, showing the election had been carried, also the statement signed by a number of the relators, voters of No. 37, designated as 'Exhibit No. 5,' requesting the annexation. Upon this information the board, consolidated school district No. 1, voted and accepted the territory comprising the district, and 37 as formally annexed.

"That proceeding of the board of consolidated district No. 1 was regular in every respect, and settled the matter so far as action of that board was concerned."

In the above case the court went on to rule that the annexation was proper.

CONCLUSION

It is therefore the opinion of this department that in an election to vote upon the proposition of forming an enlarged school district, as contained in a plan of reorganization previously approved by the State Board of Education, the County Board of Education calling said election has authority to designate the voting place or places for said election, and may limit the number of voting places to one in the proposed enlarged district.


Honorable C. D. Hamilton

It is further the opinion of this department that when the voters of a school district have voted to become annexed to an adjoining district that said annexation is completed when a majority of the members of the board of directors of the adjoining or receiving school district vote in favor of the annexation and notify the clerk of the annexing district of the action taken by the board of directors of the receiving district. No election is required to be held in the receiving school district for the voters thereof to vote on the proposition of annexing the territory of the other district.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:


J. B. TAYLOR
Attorney General

RFT:ml

Scheme whereby coupons are distributed by merchants with purchase, said coupons varying in prize value proportionally to the amount of purchase and drawing held with prizes awarded constitutes a lottery. Distribution of some free coupons without purchases does not make scheme any the less a lottery.

July 30, 1951.

Mr. David E. Harrison, Superintendent
Missouri State Highway Patrol,
Jefferson City, Missouri.



Dear Mr. Harrison:

This will acknowledge receipt of your letter to this office reading as follows:

"Attached is a copy of a handbill which has been circulated in California, Missouri. Our trooper in that area has requested your office examine it and inform us whether or not, in your opinion, it is a lottery."

The handbill referred to announcing "Appreciation Day" sponsored by the Retail Merchants Association of California, Missouri, contains the explanation that an enterprise will be conducted substantially in the following manner:

Various merchants under the sponsorship of the Retail Merchants Association are to distribute coupons upon which there is space for the person receiving said coupon to write his or her name and address. Anyone making a purchase at the various places of business of the merchants involved will be offered coupons. The coupon offered when a purchase is made in one of the participating firms will have punched thereon a "percentage" which will bear a direct relation to the amount of the total transaction. The value of the coupon varies with the "percentage" punched thereon, according to the handbill. Also, some coupons may be obtained free but, of course, these given without a purchase being made will not have a "percentage" figure punched. The person receiving the coupon writes his or her name thereon and the coupon may then be deposited in a box kept on premises of each participating merchant. Each week coupons are to be collected and placed in a "community container" from which a coupon is drawn. If the person whose name appears thereon (or the spouse of such person) is present that person is a winner. "If the person whose name is called first is not present, another and another will be drawn until somebody wins." (Quoted from handbill.)

Mr. David E. Harrison.

Because of the similarity of this enterprise to one described in an opinion rendered to the Honorable Edgar Mayfield under date of August 9, 1950, by this office, I am enclosing a copy of this opinion holding such an enterprise constitutes a lottery. The discussion therein is applicable to the enterprise described in the handbill enclosed with your letter, and since it is a clear discussion of the elements constituting a lottery there is no need for a detailed repetition of the same material here.

It is well settled in this state that the essential elements of a lottery are prize, chance and consideration. State v. Emerson, 319 Mo. 633, 1 S.W. (2d) 109; State ex inf. McKittrick v. Globe Democrat Publishing Co. 341 Mo. 862, 110 S.W. (2d) 705. We believe it is apparent in the scheme described above that the elements of prize and chance are present. However, the question arises whether the element of consideration is present, in view of the fact that the persons may receive coupons free of charge and without the necessity of purchasing any merchandise from the merchants participating in the enterprise.

The value of a coupon, however, bears a direct relation to the "percentage" punched thereon in the awarding of prizes. The scheme for varying the value of coupons by the size of a purchase made from a participating merchant is merely a variation of a plan for awarding a number of coupons to be based on the amount of the purchase. The purpose being to enhance the chances for winnings in either scheme in proportion to purchases made from participating merchants.

In this connection we are reminded of a remark by the Court in Valhalla Hotel and Company vs. Carmona, 44 Phillipine 233, 1.c. 242:

"While ingenuity is continually at work to evolve some scheme which is within the mischief but not quite within the letter of the law - we propose to go beyond the shell to the substance and to condemn the same."

In the opinion enclosed you will find this citation from our Supreme Court in the case of State v. McEwan, 343 Mo. 213, 120 S.W (2d) 1098 at 1.c. 1101:

"On the other hand, a game does not cease to be a lottery because some, or even many, of the players are admitted to play free, so long as others continue to pay for their chances. * * *"

The consideration for the chances of winning is the purchase of merchandise from the participating merchants, and even though some

Mr. David E. Harrison.

coupons are given without the necessity of purchase, the value of the chances bear a direct relationship to the amount of a purchase. The thinly veiled free coupons feature of the scheme does not take away the consideration upon which the value of the chances are placed.

We believe the enterprise in question constitutes lottery, having embodied therein the elements of chance, consideration and prize and its operation violates the laws of this state.


CONCLUSION.

It is the opinion of this department that a scheme whereby coupons are distributed by merchants to their customers with each purchase, which coupons are punched with a "percentage" fixed by the amount of a purchase, said coupons to be placed in a container and at specified periods one coupon is to be drawn from the container, and the person whose name appears upon said coupon is awarded a prize, constitutes a lottery. The fact that coupons may be obtained free from the participating merchants as well as through purchases which enhance the value of the chances does not make the scheme any less a lottery.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney-General

APPROVED:



J. E. TAYLOR
Attorney-General

JEM/ld

CIVIL DEFENSE: State agency may enter into federal matching fund agreement on behalf of a local political subdivision.

July 31, 1951

8-1-51

Mr. Ralph W. Hammond
Director
Office of Civil Defense
Jefferson City, Missouri



Dear Mr. Hammond:

Your recent letter requesting an official opinion of this department reads in part as follows:

"We are faced with a rather immediate problem concerning the Federal matching fund program outlined in Public Law No. 920, Eighty-First Congress. Recently, the Congress passed appropriation measures implemented previous of this law, which granted \$20,000,000 to the Federal Civil Defense Administration for the purpose of matching funds from the states on the procurement of medical supplies and equipment. Of this amount, \$710,000 was tentatively allocated to the State of Missouri.

"As you know, this state agency has no funds for this purpose; however, it is known that at least one political subdivision has set aside the sum of \$5,000 for such purchase. Inasmuch as the Administrator, Federal Civil Defense Administration, has indicated that Federal money will be available for matching funds from any source, provided that the resulting purchase is specifically earmarked for civil defense, we were wondering if, in such instances, the Governor or the Director of Civil Defense, as designated by the Governor, may act as negotiator of such matching fund agreements."

The Civil Defense Matching Fund Program of the Federal government is provided for by Title 50, U.S.C.A., App., Section 2281(1), of the Federal Civil Defense Act, which reads in part as follows:

Mr. Ralph W. Hammond

"(1) make financial contributions, on the basis of programs or projects approved by the Administrator, to the States for civil defense purposes, including, but not limited to the, procurement, construction, leasing, or renovating of materials and facilities. Such contributions shall be made on such terms or conditions as the Administrator shall prescribe, including, but not limited to, the method of purchase, the quantity, quality, or specifications of the materials or facilities, and such other factors or care or treatment to assure the uniformity, availability, and good condition of such materials or facilities: * * * * *

Provided further, That the amounts authorized to be contributed by the Administrator to each State for organizational equipment shall be equally matched by such State from any source it determines is consistent with its laws: * * * * *

It is therefore seen that the amounts which are matched by a state may be obtained from any source which such state determines is consistent with its laws.

Section 26.210 of Senate Committee Substitute for Senate Bill No. 66 of the Civil Defense Act, recently passed by the 66th General Assembly, provides for the establishment of local organizations for civil defense by political subdivisions of the state. Section 26.210 reads in part:

"2. In carrying out the provisions of this law each political subdivision may:

"(1) Appropriate and expend funds, make contracts, obtain and distribute equipment, materials and supplies for civil defense purposes, provide for the health and safety of persons and property, including emergency assistance to victims of any enemy attack; and to direct and coordinate the development of civil defense plans and programs in accordance with the policies and plans of the federal and state civil defense agencies;"

Authority to enter into such agreements here under consideration is furnished by Section 26.200 of the Civil Defense Act, which reads:

Mr. Ralph W. Hammond

"Whenever the federal government or officer or agency thereof shall offer to the state, or through the state to any political subdivision thereof, services, equipment, supplies, materials or funds by way of gift, grant or loan, for the purpose of civil defense, the state acting through the governor, or the political subdivision, acting with the consent of the governor and through its executive officer, may accept such offer and upon acceptance the governor or executive officer of the political subdivision may authorize any officer of the state or of the political subdivision, as the case may be, to receive such services, equipment, supplies, materials or funds on behalf of the state or the political subdivision subject to the terms of the offer."

It has been specifically provided by Section 26.180.2(5), RSMo 1949, that the governor may "delegate any administrative authority vested in him under this act, and provide for the sub-delegation of any such authority."

As you have stated in your letter, the Missouri Civil Defense Agency has no funds available to allow participation in this program. The state could, therefore, not obligate itself in any way by entering into a matching fund agreement with the Federal government. There remains the question, however, of whether or not the State of Missouri, acting on behalf of and as agent of a local political subdivision, may enter into an agreement with the Federal government whereby such local political subdivision puts up funds to be matched by the Federal government. You have stated in your request that at least one political subdivision has set aside funds for this purpose.

Section 26.200, supra, specifically provides that wherever a Federal Agency shall offer "through the state to any political subdivision thereof," funds for the purpose of civil defense, the political subdivision, acting with the consent of the governor and through its executive officer, may accept such offer. As we construe this section, any participation by a local political subdivision in the matching fund program must be effected through the state. This would allow the state agency to act on behalf of a local political subdivision in this matter.

Mr. Ralph W. Hammond

Therefore, the matching funds provided by a state may be from any source such state determines is consistent with its laws. Local political subdivisions have the authority to expend funds and enter into contracts for civil defense purposes, and also may accept funds from a Federal agency when the offer of such funds is made through the state. It is, therefore, our opinion that the State Civil Defense Agency may enter into a matching fund agreement with the Federal Government on behalf of and as agent of a local political subdivision and obligate funds of the local political subdivision pursuant to the agreement. Of course, proper authorization by such political subdivision to do so would be required.


CONCLUSION

It is, therefore, the opinion of this department that the Office of Civil Defense of the State of Missouri, may not enter into a matching fund agreement for civil defense purposes on behalf of the state with the Federal government, as the state has no funds available which it can obligate. The Office of Civil Defense may, however, enter into such agreement on behalf of a local political subdivision which has such funds available and wishes to obligate same pursuant to the terms of a matching fund agreement.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RHV:VLM

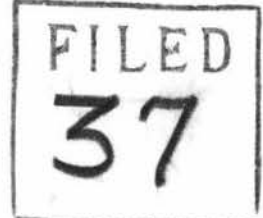
APPOINTMENT OF ATTORNEY:
FOR COUNTY COURT DRAINAGE:
DISTRICT:

Duties of prosecuting attorney and of attorney for county court drainage district incompatible. Authority of county court to supervise and control county court drainage district is broad enough to permit it to terminate employment of attorney for drainage district appointed by preceding county court.

August 7, 1951

FILED
37

Honorable Rex A. Henson
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri



Dear Mr. Henson:

We have your letter in which you request an opinion of this department. Your letter is as follows:

"I would like to have an opinion on the following two questions:

"(1) Can the Prosecuting Attorney act as an attorney for a drainage district in the County in which he holds office, as provided in Section 12400 of the Revised Statutes of Missouri, 1939?

"(2) May the County Court in a Third Class County remove the attorneys for a drainage district appointed under the provisions of Section 12400 of the Revised Statutes of Missouri, 1939, when said attorneys were appointed and acted under the preceding County Court?"

Section 12400, R.S. Mo. 1939, which is the same as Section 243.040, RSMo. 1949, is as follows:

"At the first term of the court after the filing of the petition the court shall appoint one or more attorneys, satisfactory to the owners of a majority of the acreage represented by those signing the petition to assist in the establishment of the district and advise with its officers, agents and employees, prepare reports and other necessary documents. The court shall allow

Hon. Rex A. Henson

such attorney or attorneys just compensation to be taxed as costs in the case."

Your first question is whether or not the prosecuting attorney of a county may act as attorney for a drainage district which exists in his county. In considering this question we first refer to the fact that there seems to be no statutory provision prohibiting the prosecuting attorney from engaging in the general practice of law. However, the statutes do impose upon him certain definite duties and we are of the opinion that he is precluded from accepting any employment which might be inconsistent with the performance of those duties.

Section 56.060, RSMo. 1949, is, in part, as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, * * *"

The question occurs as to whether the duties of an attorney appointed by the county court under the provisions of section 243.040, supra, are such as would conflict with the duties of a prosecuting attorney of a county. The portions of said section 243.040, pertaining to the duties of an attorney for a drainage district appointed thereunder, set forth those duties as follows:

1. Assisting in the establishment of the district and advising with its agents and employees.
2. Preparing reports and other necessary documents.

Subsequent sections outline the procedure to be followed in the process of organization of the district and provide for a report to be compiled by the engineer for the district and persons appointed by the court and designated as viewers, which said report shall include a finding by the viewers as to the extent to which each property in the district is benefited by the proposed improvement. Section 243.100, RSMo. 1949, provides certain limitations as to the assessment of benefits against public highways etc. Said section is, in part, as follows:

"1. In assessing the benefits to lands, public highways, railroad and other right of ways, railroad roadways and other property not traversed by the improvements, the viewers shall not consider what benefits will be derived by such property after other ditches or improvements shall have

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been constructed, but they shall assess only such benefits as will be derived from the construction of the improvements to be constructed by this district, or as the same may afford an outlet for drainage or protection from overflow of or damage to such property.

"2. The viewers shall give due consideration and credit to any other drains, ditch or ditches, levee or levees which may have already been constructed and which afford partial or complete protection to any tract or parcel of land in the new district.

"3. The public highways, railroad and other right of ways, roadways, railroad and other property shall be assessed according to the increased physical efficiency and decreased maintenance cost of roadways by reason of the protection to be derived from the proposed improvements.

* * * * *

Section 243.120, RSMo. 1949, provides, in part, as follows:

"1. The attorney for the drainage district or any owner of land or other property in said district, may file exceptions to said report within ten days after the last day of publication of the notice provided for in section 243.110. All exceptions shall be heard by the court and determined in a summary manner so as to carry out liberally the purposes and needs of the district, and if it appears to the satisfaction of the court, after having heard and determined all of said exceptions, that the estimated cost of constructing the proposed improvement is less than the benefits assessed against the land and other property in said district, then the court shall approve and confirm said viewers' report as so modified and amended."

It is obvious from section 243.100, supra, that benefits may be assessed against roadways belonging to the county and it is also obvious from section 243.120 that it may become the duty of the

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attorney for the drainage district to file and prosecute exceptions on behalf of the drainage district or to defend the district against exceptions filed by the county. We are of the opinion, therefore, that since it is the duty of the prosecuting attorney to institute and prosecute all suits brought by the county and to defend the county in all suits instituted against it and since it may be the duty of the attorney for the drainage district to represent the district in a controversy with the county over the assessments or benefits, the two positions are incompatible and the prosecuting attorney is precluded from acting as attorney for a drainage district located in the county in which he holds office.

Your second question is whether or not the county court in a third class county may remove attorneys for a drainage district appointed under section 243.040, supra, when said attorneys were appointed and acting under the preceding county court. Section 243.240, RSMo. 1949, and specifically paragraph 1 thereof, is as follows:

"It shall be the duty of the several county courts of this state to maintain the efficiency of the drainage districts now or hereafter organized and existing under and by virtue of the provisions of this chapter and such courts are vested with the continuous management and control of said districts with the duty and power of maintaining, preserving, restoring, repairing, strengthening and replacing the drains, ditches and levees thereof."
(Underscoring ours.)

We are of the opinion that the very broad power of management and control conferred upon the county court by the above quoted section is comprehensive enough to vest in the court the power to remove an attorney for a county court drainage district who was appointed by a preceding county court.

CONCLUSION

We are accordingly of the opinion that by reason of the conflict between the duties of the attorney for a drainage district, set forth in Section 243.040, RSMo. 1949, and the duties of a prosecuting attorney to represent the county and the state in the prosecution of their respective claims and to defend the county or the state in proceedings against either of them, the prosecuting attorney is precluded from accepting an appointment by the county court as attorney for a county court drainage district. And we are further of the opinion that by reason of the broad powers of


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management and control of the affairs of a county court drainage district by the county court set forth in Section 243.240, RSMo 1949, said county court has the right and discretion to remove an attorney appointed by a preceding county court.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

SMW:mw

COUNTY TUBERCULOSIS
HOSPITAL:

No responsibility accrues to the State of Missouri for the care of patients in a County Tuberculosis Hospital if such hospital is closed; such patients may be admitted to the Missouri State Sanatorium only upon a county order.



September 17, 1951

9-17-51

Honorable Buford G. Hamilton, M. D.
Director, Division of Health
of Missouri
State Office Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this department, your request reads in part as follows:

"Representative Ken Reynolds of Jasper County has indicated that the Board of Hospital Commissioners of Jasper County Tuberculosis Hospital plan to close that institution because they do not have adequate funds with which to continue operation.

"It has been inferred that the State of Missouri will immediately become responsible for the care of such patients as are in the Jasper County Tuberculosis Hospital when that institution is closed.

* * * * *

"Your opinion is requested in response to the following questions:

"I. What is the course which must be followed in closing a county tuberculosis hospital?

"II. What responsibility accrues to the State of Missouri for the care of patients in a county tuberculosis hospital at the time such hospital is closed?

Honorable Buford G. Hamilton, M.D.

"III. Do circumstances exist under which a group of charity patients who have tuberculosis might be admitted to the Missouri State Sanatorium without receiving a court order from the county or counties of residence of such patients?"

We assume you are seeking an answer to Question No. 1 so that you would be advised as to what you or your department would be required to do provided it was decided to close the Jasper County Tuberculosis Hospital. We have examined the statutes of this state relating to a county tuberculosis hospital, (Sections 205.380 to 205.450, inclusive, RSMo 1949), and we are unable to find that the law imposes any duty on you or your department in connection with closing a county tuberculosis hospital.

You next inquire as to what responsibility accrues to the State of Missouri for the care of patients in a county tuberculosis hospital at the time such hospital is closed. There is no legal obligation at common law on a state to furnish relief to paupers. The obligation to support such persons results only from some constitutional or statutory provision imposing legal obligation. We are unable to find any provision creating a legal obligation to care for indigent patients in a county tuberculosis hospital if it should be closed. Certainly there would be no obligation upon the state in regard to other than charity patients. Therefore, we are of the opinion that patients at a county tuberculosis hospital at the time of its closing are in a like position with persons suffering from such diseases who have never been admitted to a public institution for care and treatment.

Section 205.580, RSMo 1949, provides as follows:

"Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Under this provision the primary responsibility for poor persons is placed upon the county of which they are inhabitants. Section 199.030, RSMo 1949, provides for the admission of patients who have no ability to pay to the state sanatorium. This section reads as follows:

"The division of health is hereby given power to receive into the institution, patients who have no ability to pay, but no person shall be admitted who has not been a citizen of this state for at least one year preceding the date of application. Each person desiring free

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treatment at said sanatorium shall apply under oath to the county court in which he or she may reside, and if a resident of the city of St. Louis, to the comptroller of said city. Such applicant shall present a statement to the county court, supported by a statement of his family physician, setting out that he or she is suffering from pulmonary tuberculosis and/or that he should be under treatment and observation by the physicians at the sanatorium for such treatment and to determine whether or not he has pulmonary tuberculosis. Such applicant shall further furnish to the county court sworn statements of two residents of his county certifying that he or she is unable to pay for care at the sanatorium. If the county court shall find that the applicant is a suitable case for admission as a free patient to the sanatorium, then the county shall cause an order to be issued for the admission of the applicant and shall immediately transmit a certified copy of such order to the superintendent of the institution. Such county orders shall upon receipt by the superintendent be entered in a record book, and the superintendent, so far as practicable, shall admit such applicants as their names appear on the record book; provided, however, that admissions from the various counties, in case there is a waiting list, shall be prorated according to the population of the counties."

Since no responsibility accrues to the state for the care of patients in a county tuberculosis hospital at the time it is closed and since there is no liability on the part of the state to care for indigent patients except by statutory or constitutional provision, we do not believe that circumstances exist under which a group of charity tuberculosis patients could be admitted to the Missouri State Sanatorium without complying with the provisions of Section 199.030, RSMo 1949.

CONCLUSION

Therefore, it is the opinion of this department that the law imposes no duty on you or your department in connection with closing

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a county tuberculosis hospital.

We are further of the opinion that since no responsibility accrues to the state of Missouri for the care of patients in a county tuberculosis hospital at the time such hospital was closed, circumstances do not exist under which charity patients may be admitted to Missouri State Sanatoriums without first a court order from the county or counties of residence of such patients.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

DDG:hr

MOTOR VEHICLES: Trucks bearing advertising signs without the written permission of the State Highway Commission, and parked on the shoulder of a highway, do not violate Section 227.220, RSMo 1949.

October 11, 1951

10-15-51

Col. David E. Harrison
Superintendent, Missouri
State Highway Patrol
Jefferson City, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department, which, in part, reads:

"Quite recently, business firms have begun advertising campaigns on State highways in Saint Louis County by placing advertising signs on trucks of various sizes which are parked, during daylight hours, on the shoulder of the highway or on State-owned highway right-of-way. The trucks are legally parked insofar as they are clear of the travelled portion of the roadway, or parked as near the right hand side of the highway as practicable, and do not obstruct vision of intersections, direction signs, or warning signs. The Maintenance Engineer of Division 6 is of the opinion that the operators of these trucks violate Section 227.220 R.S. Mo. 1949, subparagraph 2, which prohibits the erection or maintenance of advertising signs on any State highway."

Section 227.220, RSMo 1949, which pertains to the question which you have submitted, provides, in part:

"The commission is authorized to prescribe uniform marking and guide boards on the state highways, and to cause to

Col. David E. Harrison

be removed all other markings and guide boards and advertising signs, and to remove any other obstruction to the lawful use of a state highway, including the right to remove or trim trees located within or overhanging the right of way of a state highway, and to prohibit and regulate the erection of advertising or other signs on the right of way of the state highways. The commission is authorized to erect, or cause to be erected danger signals or warning signs at railroad crossings, highway intersections or other places along the state highways which the commission deem to be dangerous. After plans and specifications and estimates have been made and filed by the engineer and approved by the commission it shall be the duty of the commission to advertise for bids, as is now provided for letting of contracts for constructing the state highway system as provided in section 227.100, for the erection and maintenance of marking signs, guide boards, danger signals or warning signs, and to authorize the display of such signals, signs or guide boards advertising, which, in the opinion of the commission, is not unsightly or does not obstruct the view of such signals, signs or boards, in consideration of such signals, signs or boards being erected and maintained without cost of the state, and the commission is authorized to prohibit the display of any other advertising matter within a distance of three hundred feet of such signals, signs or boards so as not to obstruct the view or impair the purpose of the same.

"2. Any person who erects or maintains advertising signs, marking or guide boards or signals on the right of way of any state highway without the written permission of the commission, or any person who willfully damages, removes or obstructs the view of sign boards or signals, erected or maintained on the highways without the written permission of the commission, shall be deemed guilty of a misdemeanor; * * *

Col. David E. Harrison

It therefore becomes necessary to construe the above section, and in doing so we must apply certain appropriate rules of statutory construction which have long been recognized and followed by the courts.

The Supreme Court of Missouri has many times held that the primary rule of construction is to ascertain the law-makers intent from the words used in the statute and give to said language its plain and rational meaning to promote the object and manifest purpose of the statute. Union Electric Co. v. Morris, 222 S.W. (2d) 767, 359 Mo. 564.

In the case of Haynes v. Unemployment Compensation Comm., 183 S.W. (2d) 77, 353 Mo. 540, the Supreme Court, in construing the Workmen's Compensation law, also said the following at S.W. l.c. 82:

" * * * This view is further supported by the well recognized rule of statutory construction that a statute must be constructed in the light of the evil which it seeks to remedy and in the light of conditions obtaining at the time of its enactment. * * *"

Again, in State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith, 115 S.W. (2d) 816, 342 Mo. 365, it was stated at S.W. l.c. 823:

" * * * In construing an act, the true intention of the framers must be followed, and where necessary the strict letter of the act must yield to the manifest intent of the Legislature. * * *"

Further in connection with the construction of statutes, the Supreme Court of Missouri, in State v. Irvine, 72 S.W. (2d) 96, 335 Mo. 261, said the following at S.W. l.c. 100:

" * * * The courts will not so construe a statute as to make it require an impossibility or to lead to absurd results if it is susceptible of a reasonable interpretation. * * *"

Therefore, having in mind the above rules of statutory construction, we look to Section 227.220, supra, to ascertain its application to the question which you have propounded.

Col. David E. Harrison

As we read the statute, the manifest purpose of the Legislature in enacting it was to provide for safe driving conditions on the highways of the state rather than to regulate or control the type of advertising which could be maintained on the highway right of way.

Insofar as advertising signs are concerned, we believe that the prohibition contained in the statute is directed to the actual erection of advertising signs of a more permanent type which might, under certain circumstances, obstruct the view of persons using the highways, and that such was the principal evil which the Legislature sought to remedy by enacting the statute rather than to control or regulate advertising or the operation of motor vehicles using the highways.

Applying the strict wording of the statute which prohibits the maintaining of advertising signs without the written permission of the Commission, it might be said that a truck or some other type of motor vehicle having advertising placed thereon in some form would constitute the maintaining of advertising signs, but we do not believe that it was the purpose of the Legislature in enacting the statute in question to include such vehicles with advertising thereon within the prohibition of the statute. Therefore, the strict letter of the act must yield to the manifest intent of the Legislature.

It is common knowledge that most of the trucks using the public highways of this state today have some sort of advertising placed on them. This is usually in the form of words and names painted on said trucks which apprise the public of the owners thereof and the nature of their business. Unquestionably the vast majority of trucks of all sizes which operate upon the state highways today bear some sort of advertising as herein described to a small or large degree.

If we are to apply the strict wording of the statute, it would mean that any person operating any truck or motor vehicle on the state highways and bearing advertising such as we have described would be violating the statute if permission of the Commission to maintain said advertising was not obtained. To give this construction to the statute would lead to an absurd or unreasonable result, and contrary to what was contemplated by the Legislature.

As we understand the facts which you have presented, that which is involved is a truck or motor vehicle which has

Col. David E. Harrison

not lost its identity as such upon which advertising is maintained, and we are not considering a structure in the nature of an advertising sign which has been erected along the highway.


CONCLUSION

In the premises, it is the opinion of this department that trucks bearing advertising signs without the written permission of the State Highway Commission, and parked on the shoulder of a state highway, clear of the traveled portion of the roadway, and which do not obstruct the vision of motorists using the highway, do not constitute a violation of Section 227.220, RSMo 1949.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RFT:ml

HOTELS: Each room in an apartment hotel is a guest room and should be counted separately for licensing purposes.

October 22, 1951

10/23/51

Honorable Buford G. Hamilton, M.D.
Director, Division of Health
Jefferson City, Missouri

FILED

37

Dear Sir:

This department is in receipt of your recent request for an official opinion.

You thus state your request:

"We would like to have your official opinion concerning whether the rooms in apartment hotels would be considered as one unit or would the various rooms, such as, kitchen, dining room, living room, and bedroom be counted separately.

"You will note under Section 9931 under the Hotel Inspection Law of the State of Missouri 'That every building or other structure in which ten or more rooms are furnished for the accomodation of such guest, -whether with or without meals, shall for the purpose of this article be deemed a hotel.' Also, under Section 9934 that the parlor, dining room, kitchen, and office shall be construed to mean guest rooms.

"The licensing fee for the various hotels is determined by the number of guest rooms. Therefore, we would like to know whether the rooms in the apartment should be counted separately or whether the apartment should be counted as one unit."

We would direct your attention to Section 315.010, RSMo 1949, which section states:

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"1. That every building or other structure kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests, in which ten or more rooms are furnished for the accommodations of such guests, whether with or without meals, shall for the purpose of sections 315.010 to 315.230 be deemed a hotel, and upon proper application the director of the division of health shall issue to such above described business a license to conduct a hotel; provided, that it shall be unlawful for the owner of any such building or other structure to lease or let the same to be used as a hotel until the same has been inspected and approved by the director of the division of health.

"2. In all hotels within the meaning of sections 315.010 to 315.230 the parlor, dining room, kitchen, and office shall be construed to mean guest rooms."

Section 315.050, RSMo 1949, bases the amount of the license to be paid by each hotel upon the number of guest rooms which it contains.

It would seem to be clear from the above that each room in each apartment is a "guest room" and should be so counted for licensing purposes.

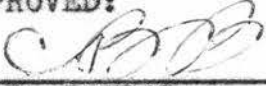
CONCLUSION

Each room in an apartment hotel is a guest room and should be counted separately for licensing purposes.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

HPWab

COUNTY HOSPITALS:
DONATIONS:

accept
A county may ~~receive~~ title to a building and to equipment which building and equipment provide "hospital and clinic facilities," said property to be operated by the board of trustees of the county hospital in that county and to be a part of said hospital.

November 13, 1951

Honorable Buford G. Hamilton, M.D.
Director, Division of Health
Jefferson City, Missouri

FILED

37

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request;

"At Vandalia, Missouri, consideration is being given to the construction of hospital and clinic facilities to be financed by several industries in that area. It is proposed to turn over the facilities to a local governmental agency for management and operation.

"Audrain County has a county hospital at Mexico, Missouri, constructed originally with public funds under authority granted counties by State statutes. The Audrain County Hospital is operated under the management of a Board of Trustees as provided for in the statutes. I have been requested by the Board of Trustees of the Audrain County Hospital to obtain an official opinion from your office as to whether or not the County of Audrain may accept the proposed hospital and clinical facilities to be constructed at Vandalia for operation of same as a part of the Audrain County Hospital under the direction of the Board of Trustees of that hospital."

From your letter it appears to be the intention of certain industries in the area of Vandalia, which is a town in Audrain County, to erect a building in that town which will be so constructed as to furnish "hospital and clinic facilities," and

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then to vest title to such building in Audrain County, such building then to be managed by the board of trustees of the Audrain County hospital as a part of the Audrain County hospital. It appears to be the further intention of these aforesaid industries to equip said building with "hospital and clinic facilities." Whether such equipment would or would not be permanently affixed to this said building, or whether part of this equipment would be so affixed and part would not be, does not appear. We will assume here that both types of equipment will be included in the proposed gift.

The question which you call upon us to answer is whether Audrain County can accept as a gift such a building and equipment to be operated and managed by the board of trustees of the Audrain County hospital as a part of said hospital.

The law of Missouri relating to county hospitals is found in Chapter 205, RSMo 1949, and in Sections 205.160 through 205.370, inclusive, in that chapter. Section 205.290 states:

"Any person or persons, firm, organization, corporation or society desiring to make donations of money, personal property or real estate for the benefit of such hospital, shall have the right to vest title of the money or real estate so donated in said county, to be controlled, when accepted, by the board of hospital trustees according to the terms of the deed, gift, devise or bequest of such property."

We will here observe that the building, the erection of which is proposed, and all equipment permanently affixed to it, would be "real estate"; and that all equipment not so affixed would be "personal property."

It will be noted that Section 205.290, quoted above, gives any person or persons, firm, organization, corporation, or society the right to donate to a county personal property or real estate to be controlled by the board of trustees of the county hospital of said county. This the industries of Vandalia are proposing to do and this Section 205.290 says they have the right to do.

Section 49.270, RSMo 1949, does specifically give a county the authority to receive gifts and donations. That section, in

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reference to county courts, states:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

(Underscoring ours.)

CONCLUSION

It is the opinion of this department that Audrain County may accept title to a building, and to equipment, located in Vandalia, which building and equipment provide "hospital and clinic facilities," said property to be operated by the Board of Trustees of the Audrain County hospital and to be a part of said hospital.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

Attorney General

HPWab

Note: Section 165.300 (now 162.44) has been amended and now provides that no election shall be called on the proposal within 2 years after the election.

SCHOOL DISTRICTS: Proceedings as prescribed by statute for
ELECTIONS: consolidation of school districts must be substantially complied with. Common school districts in annexation election cannot vote to annex to either one or the other of two consolidated districts at same election.

April 12, 1951

Honorable George Henry
Prosecuting Attorney
Newton County
Neosho, Missouri



Dear Sir:

This will acknowledge receipt of your letter of March 2, 1951, which reads as follows:

"A question has arisen in Newton County involving an interpretation of Section 165.300, relative to what may be included in the petition for annexation of a common school district to a city or consolidated district. The voters have in mind the idea that perhaps they can so word their petition so that in one election it will be determined whether or not their school district will go to one of two consolidated school districts.

"To better explain this, they want their proposition to be so worded that the voters will vote for an annexation to Midway Consolidated School District or for annexation to Granby Consolidated School District and then let the majority rule. I have checked the annotations and the digest but have found no cases in point. It is my opinion that they cannot so double up in their petition for the reason that such a proposal would in effect determine two issues at one election.

"There is no question here over the division of a school district but they seek to vote on whether or not the entire district shall go to Midway or Granby Consolidated School District. Should their petition be worded in the usual manner,

Honorable George Henry

i.e. whether or not their school district would go to Midway Consolidated School District for example, then in case that proposition was voted down their district would remain as it is for at least two years. That is the situation they hope to avoid since they want to go either to Granby or to Midway and do not wish to remain a common school district any longer.

"I would appreciate the opinion of your office on this proposition."

It is understood that your question is whether or not a petition for consolidation can be made for consolidation of a common school district to a consolidated school district or to another consolidated school district. This is to be contained in one petition carried through and voted upon by the voters at the same time. Section 165.300, RSMo 1949, in regard to the ballot to be cast, provides, in part, as follows:

"4. The voting at said special school meeting or special election shall be by ballot, as provided for in section 165.267, in the case of common school districts, or as provided for in section 165.330 in the case of town, city or consolidated school districts, and the ballots shall be

For annexation

and

Against annexation,

when the whole district is to be annexed, but if only a part is to be annexed, the ballots shall read

For Release

and

Against release.

Honorable George Henry

Reference is made in regard to annexation of common school districts, to Section 165.267, RSMo 1949. In its application to these matters, this section states:

"(1) * * * the secretary shall keep a tally and report to the chairman, who shall announce the result; and if a majority of the votes cast are for organization, the chairman shall call the next order of business."

It may be seen that in such procedure, an alternate choice of two different consolidated school districts could prevent any choice from having a majority, i.e., if there were 68 voters, 22 of whom voted for annexation to Granby Consolidated School District, 26 for annexation to Midway Consolidated School District, and 20 against annexation, there would be no majority cast for annexation as the 26 cast for Midway, or the 22 cast for Granby may be presumed to have desired to have voted against annexation, rather than be annexed to a different school district. In the above quoted subsection of Section 165.300, RSMo 1949, it is believed that a ballot is prescribed which demands substantial compliance.

In regard to the question of priorities of petitions, we quote from State ex rel Fry v. Lee, 314 Mo. 486, 1.c. 506:

"In our opinion, the power conferred by the foregoing statute upon the County Superintendent of Public Schools to determine and locate the boundary lines of a proposed district calls for the exercise of a judicial, or a quasi-judicial, discretion and function, rather than the exercise of a merely ministerial duty. (State ex rel. v. Wright, 270 Mo. 376.) This is evident from the language of the statute, which provides that, 'in determining these boundaries, he shall so locate the boundary lines as will in his judgment form the best possible consolidated district, having due regard also to the welfare of adjoining districts.' In matters calling for the exercise of a judicial function or duty by two or more

Honorable George Henry

tribunals of co-ordinate jurisdiction, it is a well-settled principle of law that the tribunal which first acquires jurisdiction of the subject matter retains jurisdiction until the determination of the matter in controversy, and no tribunal of coordinate power will be permitted to interfere with, or thwart, its action. (15 C.J. 1134.) * * *

In State ex rel. Pike County v. John P. Gordon, State Auditor, 268 Mo. 321, l.c. 326, where Pike County had submitted a proposal to voters, as follows:

"Shall the county court of Pike County, Missouri, be authorized and empowered to incur an indebtedness and to issue bonds of said county of Pike to the amount of seventy-five thousand dollars for the erection of a courthouse in the city of Bowling Green, in said county of Pike, and to incur an indebtedness and to issue bonds of said county of Pike to the amount of twenty-five thousand dollars for the erection of a courthouse in the city of Louisiana, in said county . . . ?"

James T. Blair, Judge, said, l.c. 327, 328:

"III. This court has long held that under a statute like that just referred to, two separate and distinct propositions cannot be combined and submitted, jointly, as one question, 'so as to have one expression of the vote answer both propositions, as voters thereby might be induced to vote for both propositions who would not have done so if the questions had been submitted singly.' (State ex rel. v. Wilder, 217 Mo. l.c. 269, 270, and cases cited.) No decision in this State questions the principle, and courts of other states have almost uniformly applied the same rule. (Citing of cases.)

"Relator's counsel do not question the existence of the rule, * * *

Honorable George Henry

In State ex rel. City of Joplin v. William W. Wilder, State Auditor, 217 Mo. 261, in considering the proposition submitted to the voters to construct a storm sewer in the Willow Branch District and a sanitary sewer in Sanitary District No. 7, in one proposition, the Court said, l.c. 269:

"But there is another reason why a peremptory writ should not be awarded in this case, and that is that the proposition submitted to the voters embraced two separate and distinct propositions; one for the construction of a public sanitary sewer in District No. 7, in West Joplin, and another for the construction of a storm sewer in Willow Branch District, in said city. In the way this was submitted to the voters, they had no alternative than to vote, if they voted at all, for or against both propositions. They could not vote for one and against the other, however much they might have desired to do so."

In State ex rel. Rice ex rel. Allman, et al., v. Hawk, et al., 360 Mo. 490, 228 S.W. 2d 785, Aschemeyer Commissioner related the history of an attempted annexation in Newton County, l.c. 492, as follows:

"On April 1, 1948, the qualified voters of said Common School District voted upon two propositions at a special election conducted under the provisions of Sec. 10484, R. S. 1939, as re-enacted and amended by Laws 1947, Vol. 1, p. 507, Mo. R. S. A. Sec. 10484. One proposition was to release a specified portion of the territory of said Common School District for the purpose of annexation to Fairview Consolidated School District No. C-1. The other proposition was to release the remainder of the territory of said Common School District for the purpose of annexation to Midway Consolidated School District No. C-9. The two propositions were submitted on one ballot and both were defeated."

The Court did not rule, however, on the legality of the 1948 petition as this petition was defeated. However, Aschemeyer Commissioner said further, l.c. 496:

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"* * * By its very terms, the statute recognizes only one purpose, which is to permit the annexation of territory of one school district to another, whether the proposal be to annex all or only a part of the school district."

From the above, it appears that the simultaneous vote upon the annexation violates the purpose of the legislative enactment prohibiting such special election for a period of two years.

In Farber Consol. School Dist. No. 1 v. Vandalia School Dist. No. 2 et al, 280 S.W. 69, St. L. Ct. of App., with regard to compliance with the statutes, the Court said, l.c. 71, 72:

"* * * The statutes named relate to separate and distinct methods of dividing and forming districts, annexing territory, and changing common boundary lines. State v. Scott (Mo. Supp.) 270 S.W. 382. And from the ballots it is observable, though the point is somewhat technical, that the voters in all the districts did not vote upon the identical propositions, which must be done. School Dist. v. Neal, 74 Mo. App. 553. If it was an election for annexation, the Farber ballot should have been 'for release' or 'against release.' That is the express language of the statute."

In regard to whether the provisions of Section 165.300, RSMo 1949, and related statutes are mandatory or directory 29 C.J.S., Sec. 55, p. 73, states:

"Mandatory character. Statutes respecting the duties of public officers in preparing for election are mandatory, and substantial obedience may be required by proper proceedings. Where the duties imposed on a board of election commissioners and the manner of their performance are particularly pronounced in the law, they must be followed or the acts of the board are invalid. Provisions in election laws relating to the duties and

Honorable George Henry

acts of election officials, which are mandatory if enforcement is sought before election in a direct proceeding for the purpose, are generally to be construed as only directly in proceedings attacking the election after it is held."


CONCLUSION

It is, therefore, the opinion of this department that when a school district or districts desire to become a part of a consolidated school district, in accordance with Section 165.300, RSMo 1949, the ballot for such annexation must comply with the ballot provided in said section. Therefore, a common school district cannot vote to annex to either one or the other of two separate consolidated school districts at the same election.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

JWFab

MINORS: The word "minor" used in Section 563.160, RSMo 1949, to receive definition set forth in Section 457.010, RSMo 1949.

~~that~~ "Minor" is person under 21 years of age.

July 18, 1951



Honorable Albert L. Hencke
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Sir:

The following opinion is rendered in compliance with your request of July 13, 1951, and will only determine the scope of the word "minor" as used in Section 563.160, RSMo 1949, which section reads as follows:

"Any person who in the presence of any minor, shall indulge in any degrading, lewd, immoral or vicious habits or practices; or who shall take indecent or improper liberties with such minor; or who shall publicly expose his or her person to such minor in an obscene or indecent manner; or who shall by language, sign or touching such minor, suggest or refer to any immoral, lewd, lascivious or indecent act, or who shall detain or divert such minor with intent to perpetrate any of the aforesaid acts, shall be considered as annoying or molesting said minor and shall upon conviction be punished by imprisonment in the penitentiary for a period not exceeding five years, or be punished by imprisonment in the county jail for a period not exceeding one year, or be fined in a sum not to exceed five hundred dollars or by both such fine and imprisonment."

Section 457.010, RSMo 1949, classifies minors in the following language:

"All persons of the age of twenty-one years shall be considered of full age for all purposes, except as otherwise provided by law, and until that age is attained they shall be considered minors."

Honorable Albert L. Hencke

The word "minor" used in Section 563.160, RSMo 1949, is used without qualification and no ambiguity is disclosed on the face of the statute which will permit deviation from the definition of such term contained in Section 457.010, RSMo 1949.


CONCLUSION

It is the opinion of this department that the word "minor" as used in Section 563.160, RSMo 1949, includes all persons until they have reached the age of twenty-one years.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

JLO'M:ba

PUBLIC BUILDING:

Bus station is public building
within meaning of Sections 320.070
and 320.080

July 26, 1951



Honorable George Henry
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Sir:

This will acknowledge receipt of your request for an
official opinion which reads:

"A complaint has been registered in my
office of an alleged violation of Section
320.070. The building involved in this
particular complaint is a new bus station
which is being erected and on which the
doors have been hung to open inward. My
question on which I would like the opinion
of your office is does the language 'all
other public buildings' set forth in said
Section 320.070, Revised Statutes of
Missouri, 1949, and the penal section
which follows apply to bus stations, cafes,
stores, and like buildings."

The statutes you require this department to construe are
Sections 320.070 and 320.080, RSMo 1949. Said sections read:

"All the doors for ingress and egress to
and from all public schoolhouses and all
other public buildings, and also of all
theaters, assembly rooms, halls, churches,
factories with more than twenty employees,
and of all other buildings or places of
public resort whatever, where people are
wont to assemble, excepting schoolhouses
and churches of one room and on the ground
floor, which shall hereafter be erected,
together with all those heretofore erected,
and which are still in use as such public
buildings or places of resort, shall be so
hung as to open outwardly from the audience

Honorable George Henry

rooms, halls or workshops of such buildings or places; provided, that said doors may be hung on double-jointed hinges so as to open with equal ease outwardly and inwardly."

"Any architect, superintendent or other person or persons or body corporate, who may have charge of the erection, or may have the control or custody of any of the said buildings or places of resort mentioned in section 320.070 who shall refuse or fail to comply with the provisions of said section within six months from the passage of this law, in case of said buildings or places aforesaid which have been heretofore erected, and before the completion or occupation for said purposes of any of said buildings or places now in process of erection, shall, on proof of such refusal or failure before any court of competent jurisdiction, be adjudged to be guilty of a misdemeanor, and be punished by a fine of not less than one hundred nor more than one thousand dollars, which said fine shall be collected as is now provided by law for the collection of fines in such cases, and when collected shall be paid into and become a part of the public school fund of the county, city or incorporated town in which said misdemeanor was committed."

The particular question is as follows: Does a new bus station now being erected come within the meaning of "other public buildings" as contained in the foregoing provisions? If so, then the doors of such building must comply with the provisions of the foregoing statutes, or certain persons responsible for such construction will be subject to penalty and prosecution as shown in Section 320.080, supra.

Strange as it may seem, we are unable to find any Missouri appellate court decisions construing these particular statutes, notwithstanding that they apply to many buildings and that said statutes have been in effect for many years. However, there are foreign court decisions construing their respective statutes which are similar and analogous to our laws. So, we shall refer to only a few of these cases.

Honorable George Henry

In *Miller v. McKinnon*, 124 P. (2d) 34, the Supreme Court of California construed Section 4041.18 of the Political Code which reads in part:

"Whenever the cost of construction of any wharf, chute, or other shipping facilities, or of any hospital, almshouse, courthouse, jail, historical museum, aquarium, county free library building, branch library building, art gallery, art institute, exposition building or buildings, stadium or other public buildings, or the cost of any repairs thereto or furnishing thereof shall exceed the sum of five hundred dollars, such work shall be done by contract, and any contract therefor shall be void unless the same shall be let as hereinafter provided."

The court, in construing the foregoing statute, held that the words "other public buildings" contained therein did not limit it to places where the public assembles or only to structures of the character of those in the preceding list, but that the whole policy of the act was to require competitive bidding when the county engaged in repair work exceeding \$300.00. In so holding, the court said at l.c. 40:

" * * * The terms 'other public buildings, or the cost of any repairs thereto or furnishing thereof' appearing in section 4041.18 are sufficiently comprehensive to include the bunkers, tunnel, hoists, power line, conveyor and tower.

"Plaintiff alleged that the various items were attached to and a part of the structures and buildings at the rock quarry. The term 'public buildings' is obviously not limited to places where the public assembles. A jail would clearly be a public building; yet it is not ordinarily a place of public assemblies. See *Swasey v. County of Shasta*, 141 Cal. 392, 74 P. 1031. For illustration it has been held that the term building includes a sandhopper, *Wilbur v. City of Newton*, 307 Mass. 191, 29 N.E. 2d 689; a spur track, *Saulsberry v. North American Refractories Co.*, 278 Ky. 808, 129 S.W. 2d 525; and that the terms 'structures' and 'public buildings' are

Honorable George Henry

synonymous, *Saulsberry v. North American Refractories Co.*, supra. There is no policy of law which requires that a restricted or narrow meaning be given to the term building as here used in the statute. The manifest policy of the law is to require competitive bidding when the county engages in the construction or repair of improvements costing more than the named amount."

In the instant case, we think the primary motive for enacting Sections 320.070 and 320.080, supra, was to provide a safety measure for the general public who may be at the present time in such building and that the Legislature, in enacting such laws, was not so much impressed with the particular kind of building as they were for the safety of the general public. Certainly a bus station is such a public building where large crowds frequently assemble.

The words "public buildings" have been defined to include most any place where the public congregates or assembles for any particular purpose. For instance, the appellate courts of New York have decided that a building containing 53 apartments in New York is a public building. In *Pollard v. Trivia Building Corporation*, 50 N.E. (2d) 287, 1.c. 289, 291 N.Y. 19, the court in so holding said:

"Section 202 of the Labor Law, as it was in force at the time of the accident, provided that 'on every public building where the windows are cleaned from the outside, the owner, lessee, agent, manager or superintendent in charge of such building shall provide, equip and maintain approved safety devices on all windows of such building. The owner, lessee, agent, manager or superintendent in charge of any such public building shall not require, permit, suffer or allow any window in such building to be cleaned from the outside unless means are provided to enable such work to be done in a safe manner in conformity with the requirements of this chapter and the rules of the board of standards and appeals. * * * The board of standards and appeals may make rules supplemental to this section by designating safety devices of an approved type and strength to be installed on public

Honorable George Henry

buildings or to be worn by window cleaners or both, but the absence of any such rules shall not relieve any person from the responsibility placed upon him by this section.' (Added by L. 1930, ch. 605, and amended.) The building on which the accident occurred was a 'public building' within the meaning of the statute (Labor Law, §2, subd. 13). * * * *"

In *Homin v. Cleveland & Whitehill Corporation*, 9 N.Y.S. (2d) 454, 1.c. 457, the court held that it was conceded under Section 202 of the Labor Law that a factory is a public building. In so holding, the court said:

"The proof established that the rules of the Industrial Board made pursuant to section 202 of the Labor Law required a device known as an anchor to be installed on the side frames of the windows of a public building. It was conceded that a factory is a 'public building.'"

In *Burling v. Schroeder Hotel Co.*, 291 N.W. 810, 1.c. 813, the court held that under Section 101.01, subsection (12), a hotel is a public building. That particular subsection reads:

"The term 'public building' as used in sections 101.01 to 101.29 shall mean and include any structure used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public, or three or four tenants."

In so holding, the court said:

"Consequently, as the issues were submitted under the safe place statutes, and the provisions thereof are applicable to the stairway in question because the defendant's hotel is a 'public building' under the definition of that term in subsec. (12) of sec. 101.01, Stats., the facts found by the jury render the defendant liable to plaintiff for the damages which he sustained excepting in so far as the amount of his recovery is to be diminished by reason of his contributory negligence."

Honorable George Henry

In Sharp v. Police Jury of Parish of East Baton Rouge, 193 So. 594, 1.c. 596, the court defined public building as used in the Constitution of 1921 and then quoted approvingly from 50 Corpus Juris, and said:

"'A public building in the sense anticipated by Paragraph 14(e) of Article 14 of the Constitution of 1921 has been defined to be a building owned or controled and held by the public authorities for public use. Brown v. State, 16 Tex. App. 245; McIntyre v. (Board of Com'rs of) El Paso County, 15 Colo. App. 78, 61 P. 237. A bridge has even been defined to be a public building. Arnell v. London, etc. R. Co., 12 C.B. 697, 74 E.C.L. 697.

"'In 50 Corpus Juris, page 850 et seq., we find the following:

"'Public Building. In a narrow sense a 'public building' is a building erected and owned by state, county or municipal authorities; a building owned or controlled and held by the public authorities for public use; a building belonging to, or used by, the public for the transaction of public or quasi-public business. As so defined the term 'public building' includes a high school building, a hospital, a jail, a town calaboose, or a common schoolhouse. "'In a broader sense it is defined as a building, which, although privately owned, may be fairly deemed to promote a public purpose or to subserve a public use; a building where the public congregates in considerable numbers either for amusement or for other purposes. As so defined the term 'public building' includes a camp meeting building.

"'As used in statutes. There is no hard and fast rule with respect to what may be included within the term 'public building' and where the term is unaccompanied by words of explanation or limitation, whether it includes a particular building depends upon the general scheme or object of the statute."'

Honorable George Henry

In *Kezar v. Northern States Power Co.*, 16 N.W. (2d) 364, l.c. 365, the Supreme Court of Wisconsin again construing Section 101.01, subsection (12) of the Laws of Wisconsin, held that the building occupied by the wife of the plaintiff for a dress shop was a public building, and in so holding, said:

"Plaintiff claims there was ample proof on the trial to establish that the character and use of the building, including the rear exit door and outdoor steps, were such as to constitute the building a 'public building' under the definition in sec. 101.01 (12), Stats.; and that plaintiff's status while there when he was injured was such that he was a 'frequent' under the definition in sec. 101.01(5), Stats. Upon the submittal of those issues for a special verdict, the jury answered the questions in favor of plaintiff and the findings were sustained by the court on motions after verdict. On the other hand, defendant contends plaintiff was a trespasser, and therefore the jury and court erred in finding that he was a frequent. A review of all the evidence material in considering the issues involved discloses that the jury's findings in those respects were clearly well warranted by proof which is virtually undisputed, and that no useful purpose will be served by further discussion thereof."

In view of the foregoing definitions and decisions of the various courts in other states construing the words "public building", certainly we must hold that the new bus station now under construction where many people assemble is a public building, especially in view of the fact that this is a safety measure for the people of this state, and that since such bus station is a public building as mentioned in Section 320.070, supra, the doors of said building must be constructed to conform to said statute.

CONCLUSION

Therefore, it is the opinion of this department that a bus station is a public building under Section 320.070, RSMo 1949, and that the building must be so constructed as to conform to the provisions of said statute.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SCHOOLS: Under Section 23, Article VI of the
Constitution, a school district cannot
CONSTITUTIONAL LAW: make a personal loan to a private
individual.



September 25, 1951

10-9-51

Honorable Albert L. Hencke
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this
department, which reads:

"This office desires the opinion of the
Attorney General's Department relating
to expenditures of funds by Re-organized
County School Districts.

"The question is: Does the Board of
Education of the re-organized county
school district have the authority to
make a personal loan to a private indi-
vidual?

"The Board of Education of a re-organized
school district in this county has ap-
parently given a loan in the value of
\$1200.00 to a person who drives a school
bus for said school district. This Board
of Education has taken a mortgage on said
bus of said person, and has recorded same.

"This mortgage is recorded as a second
mortgage, subsequent to one held by a
local bank."

According to the facts which you have set out in your
letter it appears that the school board in question has ex-
tended a loan to a private individual, and you inquire whether
or not the school district is authorized to make such a loan.

Honorable Albert L. Hencke

In this connection Section 23, Article VI of the Constitution of Missouri, provides as follows:

"No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution."

A school district is not specifically mentioned in the above-quoted constitutional provision. However, if it should fall within the category of political corporation or subdivision of the state, we believe that it would be prohibited from lending its credit in the manner which you have described. It, therefore, becomes necessary to ascertain the status of the school district.

In the case of State ex inf. McKittrick vs. Whittle, 63 S.W. (2d) 101, the Supreme Court, in discussing the nature of the school district, said the following at l.c. 102:

"Respondent next contends that a school district is not a political subdivision of the state. The authorities are to the contrary. It is defined by a standard text as follows: 'A school district, or a district board of education or of school trustees, or other local school organization, is a subordinate agency, subdivision, or instrumentality of the state, performing the duties of the state in the conduct and maintenance of the public schools.' 56 C.J. 193.

* * * * *

"In City of Edina to use v. School District, 305 Mo. 452, loc. cit. 461, 267 S.W. 112, 115, 36 A.L.R. 1532, we also said: 'Under the Constitution of 1875, the public schools have been intrenched as a part of the state government and it is thoroughly established that they are an arm of that government and perform a public or governmental function

Honorable Albert L. Hencke

and not a special corporate or administrative duty. They are purely public corporations, as has always been held of counties in this state."

Again, in the case of School Dist. of Oakland vs. School Dist. of Joplin, 102 S.W. (2d) 909, the Supreme Court said the following, with reference to school districts, at l.c. 910:

" * * * They are public corporations, form an integral part of the state, and constitute that arm or instrumentality thereof discharging the constitutionally intrusted governmental function of imparting knowledge and intelligence to the youth of the state that the rights and liberties of the people be preserved.
* * * They are supported by revenues derived from taxes collected within their respective territorial jurisdictions and the general revenues of the state collected from all parts of the state. These taxes and such property as they may be converted into occupy the legal status of public property and are not the private property of the school district by which they may be held or in which they may be located. * * * "

In the case of Lewis vs. Independent School Dist. of City of Austin, 161 S.W. (2d) 450, the Supreme Court of Texas was construing the constitutional provision of the Texas Constitution similar to the one above quoted from the Missouri Constitution. The court was ascertaining whether or not a school district within the meaning of the constitutional provision was a political corporation or subdivision of the state. At l.c. 452 the court said:

"Section 52, Article 3, of our Constitution, Vernon's Ann. St., declares: 'The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State, to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company.'

* * * * *

Honorable Albert L. Hencke

"That the School District is a political corporation or subdivision of the State, as described in Section 52 of Article 3 of the Constitution, is well established.
* * *"

In view of the foregoing authorities it is our thought that the school district in question would be considered a political corporation or subdivision of the state within the meaning of Section 23, Article VI of the Missouri Constitution, supra, and the prohibition against lending its credit to a private individual would be applicable.

The question remaining which is well to discuss in this opinion is whether or not the school district in question making the personal loan to a private individual was lending its credit within the meaning of Section 23, Article VI of the Missouri Constitution.

In the case of Limestone County v. Montgomery, 146 So. 607, 87 A.L.R. 166, the Supreme Court of Alabama, in discussing what constituted a violation of a constitutional provision similar to the above-quoted Missouri constitutional provision prohibiting the lending of credit, said at A.L.R. l.c. 167:

" * * * A loan of credit, or grant of money or thing of value in aid of an individual or corporation, in any mode, directly or indirectly, falls within its operation.' The test is whether it is done in good faith for the convenience and safety of the operations of the county. A loan would, we think, be included in the prohibition. * * * (Emphasis ours.)"

Again, in the case of Bannock County v. Citizens' Bank & Trust Co., 22 P. (2d) 674, the Supreme Court of Idaho, in construing a provision of the Idaho Constitution prohibiting a county, town, city or other municipal corporation lending or pledging its credit, said the following at l.c. 680:

"In interpreting the sections of the Constitution in question, the language employed must be taken and understood in its natural, ordinary, general, and popular sense. *Busser v. Snyder*, 282 Pa. 440, 128 A. 80, 37 A.L.R. 1515;

Honorable Albert L. Hencke

Cooley's Constitutional Limitations (8 Ed.)
vol. 1, p. 130; 1 Story Const. Sec. 451.
In the popular sense, lending or loaning
money or credit is at once understood to
mean a transaction creating the customary
relation of borrower and lender, in which
the money is borrowed for a fixed time, and
the borrower promises to repay the amount
borrowed at a stated time in the future,
with interest at a fixed rate. And that
is the sense, then, in which the language
employed in those sections must be under-
stood, and so understood, no county, for
example, shall lend or pledge its credit
or faith, directly or indirectly, or in
any manner which would create the customary
relation of borrower and lender. * * *

From the foregoing authorities it is, therefore, apparent
that for the school district in question to create a borrower
and lender relationship between itself and a private individual
would constitute the lending of its credit within the meaning
of the Missouri constitutional provision and would, therefore,
be prohibited.

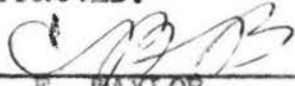
CONCLUSION

In the premises, it is the opinion of this department that
the board of education of a reorganized school district is pro-
hibited from extending a personal loan to a private individual.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RFT:ml

MAGISTRATE COURT JURORS: The compensation of magistrate court jurors is fixed by Section 499.090 and 499.100, RSMo 1949, and this compensation fixed by said sections is to be paid in both civil and misdemeanor cases.

October 4, 1951

Honorable Sam Hess
Judge of the Magistrate Court
Rolla, Missouri



Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"Jurors in the Magistrate Court of Phelps County are selected under Sections 499.010 to 499.130 inclusive. The question is: Should jurors in misdemeanor cases be paid as provided in Section 499.140? or does this section refer to civil cases only?"

Section 499.140, RSMo 1949, to which you refer, reads:

"Whenever any jury provided for in sections 499.010 to 499.160 shall serve in the trial of any case, there shall be taxed against the unsuccessful party and collected as costs the sum of one dollar for each juror who sits in the case as jury fees, which, when collected, shall be paid into the county treasury to the credit of the county revenue fund; and the person paying the same into the county treasury shall take duplicate receipts therefor, one of which shall be filed with the county clerk, and such clerk shall charge the treasurer therewith."

Section 499.090, RSMo 1949, reads:

"Each juror on the regular panel, summoned under sections 499.010 to 499.160 shall receive three dollars per day for every day he may actually serve as such, and five cents for every mile he may necessarily travel going from his place of

Honorable Sam Hess

residence to the courthouse, or other place of service on the jury where the trial may be held at a place other than the courthouse, and returning to the same, to be paid out of the county treasury."

Section 499.100, RSMo 1949, reads:

"Each juror summoned for service in a specific case and who actually serves in such case shall receive the same compensation as a juror on the regular panel and each juror summoned for a specific case but who does not actually serve in such case shall receive one dollar except that jurors summoned or serving in more than one case at the same place on the same day shall only be allowed fees in one case."

It will be observed that Sections 499.090 and 499.100, supra, are the sections which fix the compensation of magistrate court jurors, and not Section 499.140, the latter section providing for the assessment of costs against the unsuccessful party in a magistrate court trial. This being true, it would appear that the only question to be answered by us is whether Sections 499.090 and 499.100, supra, fix the compensation to be paid magistrate court jurors in both civil and misdemeanor cases.

In our opinion, the answer to this question is in the affirmative. Sections 499.090 and 499.100 are found in Chapter 499, entitled "Magistrate Court Juries," RSMo 1949. This chapter provides the manner of selecting jurors, summoning them, their compensation, their manner of payment, etc. Nowhere in this chapter are the words "civil cases" or "misdemeanor cases" used. There is nothing whatever in the chapter to indicate that the magistrate court juries for which it provides are not to be used in both civil and misdemeanor cases. On the contrary, everything in the chapter indicates that the juries for which it provides are to be used in all magistrate court cases in which a jury is used, and, as we said above, Sections 499.090 and 499.100 of that chapter are the juror compensation sections of Chapter 499, supra. Furthermore, we are unable to find elsewhere in the statutes of Missouri any specific provision for the payment of magistrate court jurors in misdemeanor cases.

Honorable Sam Hess

Section 494.120, RSMo 1949, reads:

"Each juror not on the regular panel and summoned to sit as a juror in any criminal case wherein the offense charged is punishable with death, or by imprisonment in the penitentiary for life or for not less than a specified number of years and no limit to the time, whether he shall have been selected on the panel or not; provided, he shall have traveled at least one mile and attended upon the court in obedience to such summons, shall be allowed the sum of two dollars per day for each day that he may be in attendance on said court, and five cents per mile for each mile traveled in going to and returning from said court, whether he sits in the trial of the cause or is challenged off."

It will be observed that the above section, in view of the penalties provided for, relate solely to felonies and not to misdemeanors.

Section 494.170, RSMo 1949, part one, reads:

"1. Except as otherwise provided by law jurors shall be allowed fees for their services as follows:

(1) For each juror attending a view, inquest or execution of a writ of ad quod damnum, per day \$1.00

(2) For each person summoned, attending and reporting to any court of record, per day \$1.00

(3) For each mile traveled in going to and returning from the place of trial, in attending any trial before a court of record, per mile \$.05"

However, Sections 499.090 and 499.100, quoted above, are exceptions to Section 494.170, supra, inasmuch as they "otherwise provide" for compensation of magistrate court jurors.

Honorable Sam Hess


CONCLUSION

It is the opinion of this department that the compensation of magistrate court jurors is fixed by Sections 499.090 and 499.100, RSMo 1949, and that the compensation fixed by said sections is to be paid in both civil and misdemeanor cases.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

HPWab

MUNICIPAL CORPORATIONS: Under Article VIII, Section 5, Constitution
CONSTITUTIONAL LAW: of Missouri, registration of voters can only
ELECTIONS: be provided for by state statutes, and not
city ordinances.

February 5, 1951



Honorable Wm. E. Hilsman
State Senator
Third District
Capitol Building
Jefferson City, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department, which, in part, reads:

"First: The Constitution of Missouri (1945), Article VIII, Section 5, provides that 'Registration of voters may be provided by law.' Chapter 76, Article 18, Section 11888 to 11935, contain the provisions pertaining to registration and election in counties of more than 200,000 and less than 400,000 inhabitants (St. Louis County permanent registration act). Section 11917 of this Act provides that the provisions thereof shall apply to municipal elections in cities and towns within such County having a population of over 10,000 inhabitants. That section concludes with the provision that 'all provisions regulating municipal elections in such cities or towns - - - relating to municipal elections shall remain in full force and effect as far as they are not amended and modified by the provisions of this Article'.

"It has come to my attention that several of the towns and cities in St. Louis County, Missouri, which have populations of less than 10,000 inhabitants are attempting to establish laws governing registrations and elections in said Towns under and by virtue of ordinances passed and adopted by their respective Boards of

Honorable Wm. E. Hilsman

Aldermen or City Councils. I wish to be advised as to whether such an ordinance passed and approved by a Board of Aldermen or City Council, is valid, that is I would like to know whether municipalities have the power and authority to write their own election laws or registration laws where none is provided by State law."

In this inquiry you ask if municipalities have the power and authority, by enacting ordinances, to provide for registration of voters in connection with elections when there is no statute providing for such registration.

Article VIII, Section 5 of the Constitution of Missouri, pertaining to the registration of voters, provides as follows:

"Registration of voters may be provided for by law." (Emphasis ours.)

In construing the above constitutional provision insofar as it relates to the question we must determine whether or not the term "provided for by law" has reference to state statutes only or also refers to city ordinances which may be enacted.

In the case of Lawson v. Kanawha County Court, 92 S.E. 786, 80 W. Va. 612, the Supreme Court of West Virginia, in considering a similar term appearing in its Constitution, said the following at S.E. l.c. 789:

" * * * The phrases, 'prescribed by law' and 'provided by law,' when used in Constitutions, generally mean prescribed or provided by statutes. * * *"

In the case of Board of Education v. Town of Greenburgh, 13 N.E. (2d) 768, 277 N.Y. 193, the New York Court of Appeals said at N.E. l.c. 770:

" * * * A 'law' is a rule of civil conduct prescribed by the lawmaking power of the state. 1 Kent Comm. 447. Expressions such as 'required by law,' 'regulated by law,' 'allowed by law,' 'made by law,' 'limited by law,' 'as prescribed by law,' 'created by law,' and 'a law of the state,' as used in the statutes, refer exclusively to the

Honorable Wm. E. Hilsman

statute law of the state (Brinckerhoff v. Bostwick, 99 N.Y. 185, 190, 1 N.E. 663), unless, by the purposes of the statute where the words are used, a broader signification is required. * *"

In the case of United States Fidelity & Guaranty Co. v. Guenther (C.C.A. Ohio), 31 F. (2d) 919, the court was considering the liability of an insurance company arising out of an accident occurring when the insured's employee who was over sixteen but less than eighteen years of age was driving his automobile. The insurance policy contained a provision that it would not cover any liability while the insured's automobile was being operated by any person under the age limit fixed by law or under the age of sixteen years. In the city where the accident occurred there was an ordinance prohibiting a person letting a minor under the age of eighteen years operate his automobile. There was no state-wide legislation fixing a driver's age limit. In construing the particular provision of the insurance policy the court, at l.c. 920, said:

" * * * 'The expression "by law" is at least susceptible of two constructions. It may mean or be fully satisfied by limiting it to a law enacted by the Legislature of a state. Ordinarily, when one speaks of the "law," this is what is meant. One thus speaking has in mind a rule of conduct of uniform and general application prescribed by the supreme law-making body of some sovereignty. Ordinarily, when one speaks of a law, one does not have in mind ordinances, by-laws, or regulations of a municipality. * * *'"

In the Missouri case of State ex rel. McKittrick v. Missouri Public Service Commission, 352 Mo. 29, 175 S.W. (2d) 857, l.c. 861, the court, in construing the term "prescribed by law," said:

" * * * The italicized phrase, 'prescribed by law,' by the weight of authority means, prescribed by statute law. * * *"

In Asel v. Order of United Commercial Travelers of America, 355 Mo. 658, 197 S.W. (2d) 639, the Supreme Court, en Banc, was determining the effect of a provision in an insurance contract

Honorable Wm. E. Hilsman

providing for a limitation for bringing actions against the insurance company, said provision formerly having been upheld by the courts of Ohio. The defendant insurance company was contending that under our Missouri statute a cause of action "barred by the laws" of a foreign state where it originated shall be a complete defense in Missouri. At S.W. l.c. 643 the court, in ruling on the question, said:

"But we do not agree with appellant that our Sec. 1021 imports and makes effective in this state the contractual six months limitation of action clause appearing in the benefit certificate. That statute does, it is true, provide that if a cause of action is 'barred by the laws' of the foreign state where it originated, then that bar shall be a complete defense in Missouri. But the word 'laws' as used in the section refers to the statute law of the foreign state, and not to some contract limitation which the courts of that state may have upheld. And there is no proof that there is any six months statutory limitation on such actions in Ohio. * * * And the word 'laws,' or the phrase 'by law,' when used in contextual connections similar to that appearing here, have usually been held to refer to constitutional or statutory law, especially when there is no common law on the point. * * *"

We have also examined the Constitutional Debates wherein there was much discussion in connection with the drafting of the above-quoted constitutional provision. However, generally that discussion related to the power to be exercised by the General Assembly in providing for registration of voters, and nowhere does it appear that the framers contemplated that such registration could at any time be provided for by city ordinance.

In view of the foregoing authorities we believe that the proper construction of Article VIII, Section 5 of the Missouri Constitution, supra, is that registration of voters can only be provided for by legislative enactment, and in the absence of any statute or legislative enactment a municipality is not authorized to pass an ordinance providing for registration in connection with its city elections.

Honorable Wm. E. Hilsman


CONCLUSION

It is therefore the opinion of this department that municipalities are not authorized to enact ordinances providing for the registration of voters in connection with city elections where there is no state statute providing for such registration, and that under Article VIII, Section 5 of the Constitution of Missouri, registration of voters can only be provided for by legislative enactment.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

 J. E. TAYLOR
Attorney General

RFT:ml

Taxation!

MOTOR VEHICLE FUEL TAX:

Claimant of motor vehicle fuel tax refund must declare to the seller at time of purchase his intention to use motor fuel for purposes other than propelling of motor vehicles upon the public highways of this state and declare his intention to claim a refund of the tax paid as a part of the purchase price of the fuel.

All applications for refunds under section 142.230 ^{as amended} must be filed with the collector of revenue within 120 days of the date of purchase, as shown on the original invoice or sales slip.

March 6, 1951

Mr. Andrew J. Higgins,
Prosecuting Attorney
Platte County,
Platte City, Missouri.



Dear Sir:

In reply to your recent request for an opinion from this office which request was stated as follows:

"Re: MOTOR FUEL USE TAX: Counties are not liable for payment of the Motor Fuel Use Tax for fuel consumed by motor vehicles used in repairing and maintaining county roads. Letter October 24, 1949 to: Mr. Duncan R. Jennings, Prosecuting Attorney, Montgomery County, Montgomery City, Missouri.

"I have before me the above opinion and it raises two questions to the local county court:

"1. In view of this ruling how is the county court obliged to prove to their distributors of fuel for such vehicles that they are not chargeable with the 2 cent per gallon tax?

"2. In the event that they are to pay the tax and then claim the refund, do they proceed in the manner prescribed for farmers and others coming within the refund section of the statute; and, can they go beyond the 120 day limitation period and collect a refund of tax paid prior to 120 days of a given date?

"I noticed that the above opinion was written by you and am writing to you under the theory that the answer to the above questions follow from the opinion. If the situation is otherwise I will be glad to request an opinion through the regular channels."

The opinion to which you refer in your letter deals with the Motor Fuel Use Tax found as sections 142.360 to 142.490 RSMo. 1949. The Motor Fuel Use Tax levied on motor fuels includes such fuels as butane and diesel oil used for propelling motor vehicles. Revised Statutes of Missouri 1949, sections 142.010 to 142.350 levy a tax on motor vehicle fuels; included therein as a type of fuel on which the tax is levied is gasoline. For an understanding of these taxing statutes you should keep in mind there are two different taxing provisions with a different method of collection provided for each tax and a different method of refund provided.

The opinion to which you refer in your letter discusses the Motor Vehicle Use Tax. However, the questions you present in your letter appear to involve a refund of tax paid on gasoline which is taxed under the Motor Vehicle Fuel Tax. Hence, I am presuming that your questions deal only with a refund of tax paid on motor fuel under the Motor Vehicle Fuel Tax (sections 142.010 to 142.350).

This office has recently published an opinion dealing with a refund of the tax on motor vehicle fuel to a county and concludes:

"A county is not entitled to a refund of the tax imposed by the Motor Vehicle Fuel tax on gasoline used in trucks and equipment used in maintaining, repairing or constructing public roads by virtue of being a political subdivision of the state. However, a person, including a county, who uses motor fuel on which the motor vehicle fuel tax has been paid is entitled to be reimbursed and repaid such tax upon establishing that such fuel was not used to operate or propel a motor vehicle, as defined by the taxing statute, over a public road. If the motor fuel is being used to operate a motor vehicle designed to be used for carrying persons or property over a public road then such fuel is subject to the tax imposed by the motor vehicle fuel tax, sections 142.010 to 142.350 RSMo. 1949. If the motor fuel is not being used in equipment defined as a motor vehicle and is not being operated or propelled over a public road then upon establishing such fact the county is entitled to a refund of the tax paid by it."

A copy of that opinion is enclosed.

Your first question then is: How is the county court obliged to prove to their distributors of fuel for such vehicles that they are not chargeable with the two cent per gallon tax?

The purchaser of motor fuel, such as gasoline, is not required to prove to the distributor of motor fuel that such purchaser may be entitled to a refund of the motor fuel tax. It is only necessary that the purchaser at the time of purchase declare to the seller of said motor fuel his intention to use the motor fuel for purposes

other than the propelling of motor vehicles upon the public highways of this state, and declare his intention to claim a refund of the tax paid as a part of the purchase price of the fuel. This declaration of intention is all that is required and no proof of such intention need be submitted to the distributor from whom the motor fuel is purchased. I believe section 142.230, par. 5, RSMo. 1949, is unambiguous and clear and reads as follows:

"No claim for refund of motor fuel tax under this section shall be allowed unless the supporting original invoice or sales slip indicates on its face that the purchaser at the time of purchase declared to the seller of said motor fuel his intention to use the motor fuel thus purchased for purposes other than the propelling of motor vehicles upon the public highways of this state, and declared his intention to claim a refund of the tax paid as a part of the purchase price of the fuel. As evidence of this declaration of intention, the seller of the fuel, at the time of the sale, shall indicate, by stamp or otherwise, on the face of the original invoice or sales slip, a certification that such declaration of intention was made. The certification shall be in substantially the following form:

"The undersigned, as agent for _____, the seller, hereby certifies that the purchaser of the motor fuel invoiced hereon at the time of purchase expressly declared it as his intention to use such motor fuel for a purpose other than propelling motor vehicles upon the public highways of this state, and declared his intention to file a claim for refund of the tax included in the purchase price.

Agent for Seller."

Your second question appears as follows: In the event the county court pays the tax imposed on motor vehicle fuels, how do they proceed to make application for a refund of the tax paid, may they go beyond the 120 day limitation period and collect a refund of tax paid prior to 120 days of the date of purchase.

In reply to this question your attention is directed to section 142.230, RSMo. 1949, which reads as follows:

"1. All motor fuels distributed or sold in this state by any person shall be presumed to have been sold for use in propelling motor vehicles upon the public highways of this state.

"2. Any person who shall buy and use motor fuel for any purpose whatever, except in the operation of motor vehicles upon the highways of this state, who shall have paid or have had charged to his account the license tax required by this chapter to be paid, either directly or indirectly through the amount of such tax being included in the price of the fuel, shall be reimbursed and repaid the amount of the tax, upon presenting a claim therefor to the collector of revenue.

"3. The claim to the collector of revenue shall be in the form of an affidavit, stating the purpose for which the fuel was used, and shall be supported by the original sales slip or invoice covering the purchase of the fuel. The term 'original sales slip or invoice,' as used herein, shall mean the top copy and not any duplicate original or carbon copy of the invoice or sales slip. The original sales slip or invoice, must bear the following legend: 'This is customer's invoice,' or some similar legend, and shall in addition contain the following information:

- "(1) Date of sale;
- "(2) Name and address of purchaser, which must be the name of the claimant;
- "(3) Name and address of seller;
- "(4) Number of gallons purchased and price per gallon;
- "(5) Missouri motor fuel tax, as a separate item.

"4. The forms upon which claims are to be made shall be prescribed by the collector of revenue, and he shall keep the clerks of the county courts and the comptroller of the city of St. Louis supplied with quantities of said forms.

"5. No claim for refund of motor fuel tax under this section shall be allowed unless the supporting original invoice or sales slip indicates on its face that the purchaser at the time of purchase declared to the seller of said motor fuel his intention to use the motor fuel thus purchased for purposes other than the propelling of motor vehicles upon the pub-

lie highways of this state, and declared his intention to claim a refund of the tax paid as a part of the purchase price of the fuel. As evidence of this declaration of intention, the seller of the fuel, at the time of the sale, shall indicate, by stamp or otherwise, on the face of the original invoice or sales slip, a certification that such declaration of intention was made. The certification shall be in substantially the following form:

"The undersigned, as agent for _____, the seller, hereby certifies that the purchaser of the motor fuel invoiced hereon at the time of purchase expressly declared it as his intention to use such motor fuel for a purpose other than propelling motor vehicles upon the public highways of this state, and declared his intention to file a claim for refund of the tax included in the purchase price.

Agent for Seller."

"6. All applications for refunds under this section must be filed with the collector of revenue within one hundred and twenty days of the date of purchase, as shown on the original invoice or sales slip. Upon the receipt of such affidavit and invoice or sales slip, the collector of revenue, upon approving the same, shall cause the amount of the tax that such claimant paid to be refunded by a requisition upon the state comptroller, supported by the claim, for a warrant upon the state treasurer, payable to said claimant. The warrant shall be paid by the treasurer out of any funds appropriated by the legislature for such purpose."

This section prescribes the procedure for making an application of refund of the motor fuel tax and must be followed before the refund can be made. The same procedure is followed by any applicant for the refund under this section.

The application for refund under this section must be filed with the collector of revenue within 120 days of the date of purchase, as shown on the original invoice or sales slip. The statute makes it mandatory that the application for refund must be filed within this time limit by the claimant for refund.

Section 142.250, RSMo. 1949, provides in part as follows:

"* * * or any refund required to be made under the provisions of this law which shall be denied or withheld wrongfully, may be recovered by the person paying the same in a suit at law against the state of Missouri * * *.

"(3) Such suit shall be commenced within five years from the date of the payment of the sum or within five years from the date of final rejection of the claim by the collector of revenue."

While this section establishes a five year period in which suit may be commenced to recover a refund refused to be made it does not affect the clear and unambiguous mandate that all applications for refund under section 142.230 must be filed with the collector of revenue within 120 days of the date of purchase, as shown on the original sales sheet or invoice.

CONCLUSION.


1. An applicant for refund of motor vehicle fuel tax imposed by sections 142.010 to 142.350 is required to declare his intention to the seller at the time of purchase to use the motor fuel for purposes other than the propelling of motor vehicles upon the public highways of this state; and declare his intention to claim a refund of the tax paid as a part of the purchase price of the fuel. The purchaser is not required to submit further proof of the use to be made of the motor fuel other than this declaration of intention.

2. A refund of the motor vehicle fuel tax is made pursuant to the procedure prescribed by section 142.230 RSMo. 1949. It is made mandatory by the statute that all applications for refund under section 142.230 must be filed with the collector of revenue within 120 days of the date of purchase, as shown on the original invoice or sales slip.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney-General.

JEM/ld

COUNTY LIBRARY DISTRICT:

A library building and lot is owned by the county library district; library funds may be used to redecorate a building the library district rents.

October 10, 1951

10-10-51



Honorable Wilson D. Hill
Prosecuting Attorney of
Ray County
Richmond, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this department which reads as follows:

"The County of Ray is a third class county and we have established a County Library District and a County Library Board has been appointed.

"1. If the Library Board buys a lot and builds a library building, who would own it?

"2. Is it legal to use Library funds to renovate or redecorate a building the Library District rents?

"3. Is it legal for the Library District to rent a building which belongs to a member of the Library Board?

"4. Would it be legal to rent a building which is owned by the wife of a Library Board Member?"

Wilson D. Hill

Authorization for the organization of a county library district is found in Chapter 182, Sections 182.010 to 182.130, RSMo 1949, Section 182.020, thereof, authorizes the establishment of a county library district which "shall be a body corporate."

Section 182.020, RSMo 1949, reads in part as follows:

"And if, from returns of such election, which shall be certified to the county court, the majority of all the votes cast on such propositions at such election shall be

'For establishing--county library district,'

and for the tax for a free county library, the county court shall enter of record a brief recital of such returns and that there has been established

'- -county library district,'

and thereafter such

'- -county library district,'

shall be considered and held to be established, shall be a body corporate, and known as such; * * *."

(Underscoring ours.)

Section 182.050, RSMo 1949, provides for the creation of a county library board for the purpose of carrying into effect Sections 182.010 to 182.130, RSMo 1949.

Section 182.070, RSMo 1949, delineates a part of the powers of the library district to be exercised through the board. Said section reads as follows:

"Said '_____ county library district' as such body corporate, by and through said county library board, shall have the power to sue, and be sued, to complain and defend, and to make and use a common seal, to purchase or lease grounds, to lease, occupy or to erect an appropriate building or buildings for the use of said county library and branches

thereof, and to sell and convey real estate and personal property for and on behalf of the county library and branches thereof, to receive gifts of real and personal property for the use and benefit of such county library and branch libraries thereof, the same when accepted to be held and controlled by such board, according to the terms of the deed, gift, devise or bequest of such property."

(Underscoring ours.)

It is clearly expressed in this section that a county library district, as a body corporate, may purchase a lot and build thereon a library building, this power being exercised through the library board. A public corporation must exercise its powers through agencies created for that purpose by law. Any authorized purchase of land by a new library board would be for, and on behalf of the library district, in whom title vests.

It is a well settled law in this state that a public corporation is subject generally to the rules of law governing other corporations. State ex rel. Highway Commission v. Bates, 317 Mo. 696, 1. c. 701. As a general rule a corporation has only such powers as are expressly or impliedly conferred by its charter. This rule is stated in 19 C. J. S., 369, as follows:

"A corporation has no natural rights or capacity such as an individual or an ordinary partnership, and it has no powers except such as are expressly or impliedly conferred by its charter."

The following definition of charter is found in 19 C. J. S., Corporations, 376:

"When a corporation is formed by or under a special act of the legislature, its powers are generally specified in the act itself, and this act together with any other laws, general or special, which are made binding on, or applicable to, it constitutes its charter for the purpose of ascertaining its powers and duties."

The rule in regard to implied powers is found in 19 C. J. S., Corporations, Section 945, page 373, as follows:

Wilson D. Hill

"In addition to the powers above mentioned in section 944 as being incidental to corporate existence, it is a well settled principle that corporations, in the absence of express restrictions, have the implied power to do all acts that may be necessary to enable them to exercise the powers expressly conferred, and accomplish the objects for which they were created. * * *"

It is further stated in the same section at page 375:

"The implied powers of a corporation are not limited to such as are absolutely or indispensably necessary to carry into effect those expressly granted, but comprise all that are necessary, in the sense of being appropriate, convenient, and suitable as tending directly to accomplish such purposes, including the right of a reasonable choice of means to be employed. The modern rule has been well stated thus: 'If that act is one which is lawful in itself and not otherwise prohibited, is done for the purpose of serving corporate ends and is reasonably tributary to the promotion of those ends, in a substantial and not in a remote and fanciful sense, it may fairly be considered within charter powers.'"

In reading the above quoted rule it is noted that the implied powers of a corporation are not limited to those which are absolutely or indispensably necessary to carry into effect the expressed powers granted, but that they need only be necessary in the sense of being appropriate, convenient, and suitable in accomplishing the purpose of the corporation.

We are, therefore, of the opinion that a county library board which rents a building for housing the county library could take necessary steps to render such building appropriate and suitable for that purpose and may use library funds to renovate or redecorate, limited only in that it be reasonably necessary to effectuate the purpose based upon the sole discretion of the board after a consideration of all facts and circumstances.

In regard to questions 3 and 4 of your request, I am enclosing an opinion to the Honorable Fred C. Bollow, Prosecuting Attorney of

Wilson D. Hill

Shelby County, Missouri, dated June 30, 1948, which holds that it is against the public policy of this state for a member of a public board to contract with the board where there is, or may be a personal gain or advancement. We believe that this opinion is applicable to the questions which you have presented and would extend to include a wife of a board member for the same reason.

CONCLUSION


Therefore, it is the opinion of this department that if a library board buys a lot and erects thereon a library building both would be owned by the county library district.

We are further of the opinion that library funds may be used to renovate or redecorate a building the library district rents, if it is reasonably necessary to render said building appropriate and suitable for housing the county library.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

DDG:hr

INTOXICATING LIQUOR: Missouri law does not prohibit the sale of intoxicants to persons who have formally been adjudged to be mentally incompetent.

February 7, 1951

2/9/51

Honorable Paul S. Hollenbeck
Judge of the Probate Court
Maries County
Vienna, Missouri



Dear Sir:

Your recent request for an official opinion has been assigned to me to answer.

Your request states:

"Will appreciate it if you will advise me
if there is any law prohibiting the sale
of beer to a person who has been duly
adjudged incompetent by the Probate Court.
* * * *"

A thorough search of the laws of Missouri, including the regulations of the Liquor Control Department of Missouri, fails to reveal any law prohibiting the sale of intoxicating liquors to persons who have formally been adjudged mentally incompetent. Neither have we been able to find any Missouri cases touching upon this matter.

Section 311.310, R. S. Mo. 1949, does prohibit the sale of intoxicants to "an habitual drunkard," and makes such sale a misdemeanor. An "habitual drunkard" has been defined as one with "a fixed habit of drinking to excess;" one who has "a persistent habit of drinking to excess;" one who has "lost the will power to resist any intoxicating liquor offered to him." See *Ash v. Ash*, 64 N.E. 2d, 741; *Blunk v. Blunk*, 64 N.E. 2d, 787; *Griaietis v. Griaietis*, 48 N.E. 2d, 775; *Kessel v. Kessel*, 46 S.E. 2d, 792.

This prohibition against sales to an habitual drunkard appears to be the nearest approach in Missouri law to your point of inquiry.

Honorable Paul S. Hollenbeck

CONCLUSION

Missouri law does not prohibit the sale of intoxicants to persons who have formally been adjudged to be mentally incompetent.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

OK

J. E. TAYLOR
Attorney General

HPWab

BOARD OF POLICE COMMISSIONERS
(St. Louis)

) Under the Missouri Statutes the St. Louis
) Board of Police Commissioners may employ
) policewomen with the same duties, powers
) and privileges as policemen.

May 17, 1951

5/22/51

Honorable William L. Holzhausen
President
Board of Police Commissioners
1200 Clark Avenue
St. Louis, Missouri



Dear Sir:

I have before me, for answer, your request for an opinion which is as follows:

"The Board of Police Commissioners respectfully requests an opinion from you whether under the Missouri Statutes we can employ policewomen with the same duties, powers and privileges as policemen.

"In connection with the subject matter, we refer you to Sections 84.100, 71.200, and 71.210 of the Revised Statutes of the State of Missouri for the year 1949.

"You will observe that Section 84.100 refers to 'policemen,' while the other two sections cited above are much broader in their scope."

Section 84.100, RSMo 1949, the main subject of your request, is as follows:

"To enable said boards to perform said duties imposed upon them, they are hereby authorized and required to appoint, enroll and employ a permanent police force for the said cities,

Honorable William L. Holzhausen

which they shall equip and arm as they may judge necessary. The number of patrolmen to be appointed shall not be more than fourteen hundred and five, of which number not more than one hundred and fifty thereof are to be probationary patrolmen. The number of turnkeys to be appointed shall be thirty-five, and in the appointment of such turnkeys, retired and disabled policemen shall be given the preference. Together with the officers mentioned in section 84.150, such number of patrolmen, probationary patrolmen and turnkeys may be increased to such additional force as extraordinary emergencies may require, and any ordinance of the municipal assembly or common council tending to diminish the number of men above specified shall be null and void. The boards alone shall have the power to determine whether such extraordinary emergencies requiring additional patrolmen, probationary patrolmen or turnkeys exist or not, and their finding in the matter is not subject to review by any other power."

We believe that Section 1.030, RSMo 1949, clarifies the wording used in Section 84.100, supra, said section is as follows:

"1. Whenever, in any statute, words importing the plural number are used in describing or referring to any matter, parties or persons, any single matter, party or person shall be deemed to be included, although distributive words may not be used.

"2. When any subject matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included."

(Underscoring ours.)

Honorable William L. Holzhausen

Taking paragraph 2, Section 1.030, supra, into consideration when reading Section 84.100, supra, we find that the words 'policemen' and 'patrolmen,' etc., the masculine gender, shall be deemed to include the words 'policewomen' and 'patrolwomen,' etc., the feminine gender. This statute (1.030) then by its terms makes it necessary to include the female gender where the masculine gender is referred to in Section 84.100, supra.

Sections 71.200 and 71.210 are as follows:

"71.200. Women as members of police force.--All cities in this state now containing or that shall hereafter contain five thousand inhabitants or more shall have power to appoint women as members of the police force and to prescribe their duties and provide for their compensation.

"71.210. Women members of police force--appointment.--The power to appoint women as members of the police force and to prescribe their duties and provide for their compensation as provided for in section 71.200, shall be exercised by that department of each of the several city governments of the state that now is or shall be invested with the power to appoint other members of the police force."

These sections of the statutes, without any doubt, give the department that now is or who shall be vested with the power to appoint other members of the police force, in cities having five thousand (5,000) inhabitants or more, the power to appoint women as members of the police force, to prescribe their duties and provide for their compensation.

CONCLUSION

It is, therefore, the opinion of this department that

Honorable William L. Holzhausen

the Board of Police Commissioners of the City of St. Louis
may employ policewomen with the same duties, powers and
privileges as policemen.

Respectfully submitted,

APPROVED:

A. BERTRAM ELAM
Assistant Attorney General

A handwritten signature in dark ink, appearing to be 'J. E. Taylor', written over a horizontal line.

J. E. TAYLOR
Attorney General

ABE/fh

TAXES OF
SERVICE MEN)

A member of the armed forces stationed in Missouri,
but ~~elsewhere~~ elsewhere, is not subject to the payment
of a tax on personal property in this state.

June 12, 1951

6-12-51

FILED

41

Honorable W. H. Holmes
State Auditor
Jefferson City, Missouri

Dear Mr. Holmes:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"What exemptions, if any, do members of the United States armed forces, residing permanently or temporarily in Missouri at assessment time, have in connection with their being assessed and subjected to the paying of Missouri real estate and tangible personal property tax?"

The Soldiers' and Sailors' Civil Relief Act of 1940 was passed by Congress to protect the rights of the men in service. This statute is incorporated in pages 96 to 202 of the Appendix to Title 50, United States Code Annotated. Section 560 of this act undertakes to give relief to soldiers and sailors who may default in the payment of their taxes, but no exemptions are provided for in the law.

Section 574 of the act, which defines the rule of law governing the question of legal residence of members of the armed forces, is as follows:

"(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the fore-

Honorable W. H. Holmes

going, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district: Provided, That nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

"(2) When used in this section, (a) the term 'personal property' shall include

Honorable W. H. Holmes

tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: Provided, That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid. Oct. 17, 1940, c. 888, Sec. 514, as added Oct. 6, 1942, c. 581, Sec. 17, 56 Stat. 777, and amended July 3, 1944, c. 397, Sec. 1, 58 Stat. 722."

This makes it perfectly clear that a person does not gain a residence in Missouri solely by reason of being stationed within the state on duty as a member of the armed forces of the United States; and no such person is subject to the payment of a tax on his personal property, unless he has actually established permanent residence within the state. This law does not, as a matter of course, undertake to release servicemen from the payment of taxes on real estate. Such taxes are payable by nonresidents as well as by persons who reside within the state, and no exceptions are made in favor of members of the armed forces.


CONCLUSION

It is the opinion of this office that a member of the armed forces of the United States stationed in Missouri on duty, but not actually a resident of the state, is not subject to the personal property tax laws of the state. He is not exempt, however, from the payment of a tax on any real estate that he may own in the state.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

#229
APPROVED:


J. E. TAYLOR
Attorney General

BAT/fh

MERCHANTS' TAX)

) The county collector is authorized to institute
) suit and prosecute the same against a merchant
) who fails to file the statement required in
) Section 150.050, RSMo 1949.

June 13, 1951

6-13-51

Honorable W. H. Holmes
State Auditor
Jefferson City, Missouri

FILED

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Dear Mr. Holmes:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"Section 150.050, R. S. Mo., 1949, provides in part: On the first Monday in May, 1946, and on the same date each year thereafter, it shall be the duty of each person, corporation or co-partnership or persons, as provided by Sections 150.010 to 150.290, to furnish to the assessor of the county in which such license may have been granted, a statement of the greatest amount of goods, wares, and merchandise which he or they may have had on hand at any one time between the first Monday in January and the first Monday in April next preceding; said statement shall include goods, wares, and merchandise owned by such merchant, and consigned to him or them for sale by other parties.

"In the event the statement required by Section 150.050, R. S. Mo., 1949, is not furnished the assessor, what procedure does he (the assessor) follow to obtain said statement?"

Honorable W. H. Holmes

The statute governing the license required of merchants and the tax on merchandise is contained in Sections 150.010 to 150.290, RSMo 1949. Section 150.100 provides that no person or business firm shall be allowed to sell goods without first having obtained a license according to law, and any merchant found in violation of this section shall be deemed guilty of a misdemeanor. A tax on merchandise is provided in Section 150.040. Under Section 150.050 each and every merchant is required to furnish to the assessor of the county an annual statement of the greatest amount of goods which he may have had in stock at any one time between the first Monday in January and the first Monday in April, and this statement is used as the assessment for the tax.

Section 150.160 provides that any merchant applying for a license to sell merchandise shall, before receiving such license, execute a bond to the state, conditioned that he will pay to the collector of the county all merchants' tax due. Said bond, however, shall not be required of any merchant who has obtained and paid a license as required by law for a period of five continuous years immediately preceding his application for a license for the current year. But the actions authorized for default of said bonds shall be prosecuted against any such merchant to the same effect as if such bond had been given.

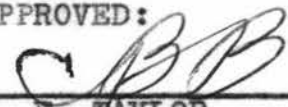
There is no authority vested in the assessor to compel a merchant to furnish the statement required in Section 150.050. The remedy lies in Sections 150.240 and 150.270. Any merchant who shall fail to file such statement, as required by law, shall be deemed to have forfeited his bond; and it becomes the duty of the county collector to institute suit to recover an amount three times as great as the revenue which may be found to be due.

CONCLUSION

It is the opinion of this office that the assessor has no legal means of forcing a merchant to furnish the statement required in Section 150.050, RSMo 1949. But the county collector has full power, under Sections 150.240 and 150.270, RSMo 1949, to institute suit and prosecute the same against any such offending merchant for three times the amount of the tax which may be found to be due.

Respectfully submitted,

APPROVED:


J. E. TAYLOR
Attorney General

B. A. TAYLOR
Assistant Attorney General

BONDS: Bonds issued by Frankford School District for
SCHOOL DISTRICTS: payment of general expenses of the school district are eligible for registration.

August 7, 1951

Honorable W. H. Holmes
State Auditor
Jefferson City, Missouri

Attention: Mr. Alvin Papin, Bond Clerk

Dear Sir:

8-29-51



This will acknowledge receipt of your request for an official opinion which reads:

"The Frankford Missouri School District has voted bonds in the amount of \$12,000.00, for the purpose of giving the district necessary funds to pay the general expenses of the school.

"This office has refused to register the bonds for the reason that there is no statutory provision for their issuance. We enclose a letter herewith from the Law office of Mr. Jas. B. Clemens, Bowling Green, Mo., supporting their contention that these bonds should be registered.

"Please give us your opinion as to whether or not these bonds are eligible to be registered."

You state that you have refused to register the bonds for the reason there is no statutory authority to issue said bonds. We do not find any specific statute authorizing the issuing of bonds for general school expenses. We find Section 165.040, RSMo 1949, authorizing the issuance of school bonds, and it provides that a board of directors of a school, for the purpose of purchasing schoolhouse sites, erecting schoolhouses, library buildings and furnishing the same and building additions to or repairing old buildings, is authorized to borrow money and issue bonds and provides for an election to finally determine if the loan shall be made. Section 165.040, supra, reads in part:

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"1. For the purpose of purchasing school-house sites, erecting schoolhouses, library buildings and furnishing the same, and building additions to or repairing old buildings, the board of directors shall be authorized to borrow money, and issue bonds for the payment thereof, in the manner herein provided. The question of loan shall be decided at an annual school meeting or at a special election to be held for that purpose. Notice of said election shall be given at least fifteen days before the same shall be held, by at least five written or printed notices, posted in five public places in the school district where said election shall be held, and the amount of the loan required, and for what purposes; it shall be the duty of the clerk to sign and post said notices. The qualified voters at said election shall vote by ballot. Those voting in favor of the loan shall have written or printed on their tickets, 'For the loan;' those voting against the loan, the words 'Against the loan,' and if two-thirds of the votes cast on the proposition shall be for the loan, the district board shall be vested with the power to borrow money, in the name of the district, to the amount and for the purpose specified in the notices aforesaid, subject to the restrictions of section 165.043."

While it might be argued under decisions that the terms of the foregoing statute are sufficiently broad to include general school expenses, we deem it unnecessary to further explore that line of authority for the reason we are inclined to believe that Section 26(b) of Article VI of the Constitution of Missouri, 1945, is self-enforcing and needs no act of the Legislature to make it effective. Section 26(b), Article VI, reads:

"Any county, city, incorporated town or village, school district or other political corporation or subdivision of the state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted

Honorable W. H. Holmes

in an amount not to exceed five per centum of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes."

In State ex rel. Brown v. Woods, 61 S.W. (2d) 732, 332 Mo. 1123, the court held that constitutional provisions limiting the rate of taxation for school purposes are self-enforcing. See also Thomas v. Buchanan County, 51 S.W. (2d) 95, 330 Mo. 627. In State v. Smith, 194 S.W. (2d) 302, 1.c. 304, the court held that a constitutional amendment was self-executing if it provided for an election to be held in a municipality and where there was no special statutory provision for the holding of an election that the general statutes in relation to elections authorizing the contract of debts in excess of a municipality's annual income and revenue was applicable, and in so holding, the court discussed numerous other decisions and said:

" * * * We think the language so plain, and its intent so evident that it must be held to directly confer upon the city the authority to issue and sell such revenue bonds as are here under scrutiny 'by vote of four-sevenths of the qualified electors thereof voting thereon.' It is true that there is no statute expressly providing the manner of conducting an election to determine whether or not a municipality shall issue such revenue bonds, so the question is reduced to whether this circumstance is an insurmountable barrier. It will be recalled that it is conceded that said proposition was approved by a vote of more than four-sevenths of the electors voting at the special election, which election complied in every way with the general statutes in relation to elections to authorize the contracting of debts in excess of a municipality's annual income and revenue (§ 7368-7372). We have reached the conclusion that, in view of our holdings under closely analogous situations, the utilization of the general statutes just referred to was authorized and efficacious.

"State ex rel. Clark County v. Hackmann, 280 Mo. 686, 218 S.W. 318, is directly in point.

Honorable W. H. Holmes

There a constitutional provision was held to be self-executing which granted power to counties to create debts for county public purposes by elections (by a prescribed majority) held for the purpose, but no machinery was provided for such election. A special election was called upon a petition signed by more than 300 voters and taxpayers at which the proposition to issue the bonds was submitted, and approved by the requisite majority. After that election, and before the case was determined on appeal, the legislature passed an act specifically providing a method of holding such elections. And this court held it sufficient if there is used the ordinary and usual machinery provided for obtaining the expression of the voters upon the question. The following from *State ex rel. Miller v. Missouri K. & T. Ry. Co.*, 164 Mo. 208 loc. cit. 213, 64 S.W. 187 loc. cit. 188, was cited approvingly: 'The power being conferred to hold an election, and no means provided therefor, carries with it as an inevitable and indubitable incident the usual and customary means to put into effect the power thus conferred.' The court further held that despite the later enacted specific act, there was authority for the election. The *Clark County* case was followed in the later case of *State ex rel. Gilpin v. Smith*, 339 Mo. 194, 96 S.W. 2d 40."

Section 165.047, RSMo 1949, provides that all bonds issued by such school districts shall be issued under the same procedure and in the same manner as bonds authorized by Section 165.040, *supra*.

In view of the foregoing decisions, we believe Section 26(b), Article VI of the Constitution of Missouri, 1945, is self-enforcing, and in the absence of any particular statutory procedure for holding an election under the foregoing constitutional amendment, we are of the opinion that the general procedure prescribed under Section 165.040, *supra*, is applicable.

Honorable W. H. Holmes


CONCLUSION

Therefore, it is the opinion of this department under Section 26(b), Article VI of the Constitution of Missouri, 1945, and the foregoing decisions, that the bonds voted by the Frankford, Missouri School District in the amount of \$12,000.00 for the purpose of defraying general expenses of the school are eligible for registration if they do not exceed the limitations contained in said constitutional provision and there are no irregularities in the election and said bonds are in proper legal form.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

ARR:VLM

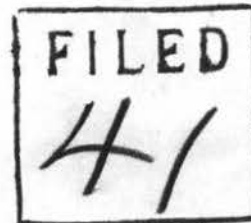
SOCIAL SECURITY:
COUNTY BUDGET LAW:

County contribution imposed by
Senate Bill No. 3 is included in
the 1951 budget and is payable
from class 4.

August 28, 1951

8-29-51

Honorable W. H. Holmes
State Auditor
Capitol Building
Jefferson City, Missouri



Dear Sir:

Reference is made to your recent request for an official
opinion of this department which request reads as follows:

"In instances where county courts enter
into contract and agreement with the
State Comptroller for coverage under
Senate Bill Number 3 of the Sixty-Sixth
General Assembly, the employer's con-
tribution to be borne by the county, is
it permissible for the county court to
make the contribution for the year 1951,
in as much as said contribution was not
included in the 1951 budget? If it is
permissible, from what class of the
General Revenue should the contribution
be made?

We are assuming for purposes of this opinion that you have
reference to the county budget law for counties of the third and
fourth class since you have asked from what class of general
revenue the county's contribution under Senate Bill No. 3, should
be made.

You first inquire whether it is permissible for the county
court to make the employee's contribution under Senate Bill No. 3
inasmuch as said contribution was not included in the 1951 budget.

Honorable W. H. Holmes

I am enclosing an opinion rendered to the Honorable Joe C. Welborn, Prosecuting Attorney of Stoddard County, dated July 18, 1949, holding that a prosecuting attorney's increase in salary, as provided by the General Assembly, is automatically included within the budget of counties of the third and fourth class although the act granting such increase was not passed until after the county budget was drawn up. The reasoning found in this opinion would be applicable to your question. In other words, although Senate Bill No. 3 authorizing the county court to make employer's contributions was not finally approved until after the 1951 budget was drawn up, nevertheless such an expenditure by virtue of said act would be automatically included in the 1951 budget.

You next inquire from what class of general revenue should the contribution be made.

Section 50.710, RSMo 1949, provides for the classification of estimated expenditures as follows:

"The court shall show the estimated expenditures for the year by classes as follows:
"

"Class 1. Care of paupers declared by lawful authority to be insane (in state hospitals).

"Class 2. Expense of conducting circuit court and elections, not to include the salary of any officer or employee on a yearly salary nor deputy or assistant of any kind whatever though on irregular time, such shall be estimated for under class four. Class two shall include pay of jurors, witnesses if properly paid by the county, and other incidental court costs, pay of judges and clerks of elections and all other expense of elections chargeable against the county. This estimate shall not be less than last preceding even year in even years and last preceding odd year in odd numbered years.

"Class 3. Repair, upkeep and construction of roads and bridges on other than state highways and not in any special road district. List roads and bridges to be constructed.

"Class 4. Pay or salaries of officers and

office expense. List each office separately and the deputy hire separately. (County clerk shall prepare estimate for the county court but his failure does not excuse the court.)

"Class 5. Contingent and emergency expense. - The county court may transfer any surplus funds from class one, two, three, and four to class five to be used as contingent and emergency expenses. Purposes for which the court proposes the funds in this class shall be used shall be shown.

"Class 6. Amount available for all other expenses after all prior classes have been provided for. No expense may be incurred in this class until all the prior classes have been provided for. No warrant may be issued for any expense in class six unless there is an actual cash balance in the county treasury to pay all prior classes for the entire current year and also any warrant issued on class six. No expense shall be allowed under class six if any warrant drawn will go to protest; provided, however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of such prior funds. Nor may any warrant be drawn or any obligation be incurred in class six until all outstanding lawful warrants for prior years shall have been paid. The court shall show on the budget estimate the purpose for which any funds anticipated as available in this class shall be used."

By a mere reading of the first three classes it is easily determinable that such expenditure does not come under any of them, because the expenditure is not for the care of paupers who are insane in state hospitals, nor is it for the expense of conducting circuit courts or holding elections, nor is it for the repair or construction of roads and bridges.

We are likewise of the opinion that it was not intended to fall within class 5 or 6, although in one sense it might be considered a contingent or emergency for the year 1951. We do not

Honorable W. H. Holmes

believe that this is the correct interpretation in view of the case of Gill v. Buchanan County referred to in the enclosed opinion, it holds that a like expense was automatically included at the time it was drawn up. Since no warrant may be issued for any expense in class 6 unless there is an actual cash balance in the county treasury to pay all prior classes for the entire year and since under the provisions of Senate Bill No. 3, it was contemplated that the county should have funds available to make such contributions, we do not believe that it could be considered in this class.

The county's contribution in regard to officers and employees under Senate Bill No. 3 bears a close affinity to the pay or salary of officers and office employees. It, of necessity was based upon the number of officers and employees and is proportionate to salaries received by such officers and employees. Therefore, we are of the opinion that since this expenditure was automatically included in the county budget for 1951, it was intended to be paid from funds in class four of the county budget law for counties of the third and fourth class.


CONCLUSION

Therefore, it is the opinion of this department that the contributions imposed upon counties by the provisions of Senate Bill No. 3 is automatically included within the budget of counties of the third and fourth class and is payable out of class four of the county budget law applicable to such county.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

DDG:hr
encl.

COUNTY TREASURERS:) Intangible tax forms must be furnished by the
) State Director of Revenue to all county treasurers
 INTANGIBLE TAX FORMS:) in third and fourth class counties in this state.

October 2, 1951

10/3/51

FILED
41

Honorable W. H. Holmes
State Auditor
Jefferson City, Missouri

Dear Sir:

Your letter of September 18th requesting an opinion of this department has been received, which letter is as follows:

"This department requests an opinion on the following question:

"Does House Bill No. 199, passed by the Sixty-sixth General Assembly, apply to county treasurers in third and fourth class counties adopting township organization?"

We have examined the law relating to intangible property, intangible property taxpayers, county treasurers generally and county treasurers in counties which have adopted township organization. Every third and fourth class county in the state has a county treasurer, including the counties which have adopted township organization.

We find nothing in the law which would prevent House Bill No. 199, passed by the Sixty-sixth General Assembly, from meaning anything other than what the Legislature apparently intended that it should mean. It was evidently the intention of the Legislature that this statute should apply to all third and fourth class counties in the state.

House Bill No. 199, Sixty-sixth General Assembly, is as follows:

"Section 1. It shall be the duty of the state director of revenue to furnish, on or before the first day of January in

Honorable W. H. Holmes

each year, to the county treasurers of each county under charter form of government and to the county treasurers of class two, three and four counties in this state, forms for the use of the citizens of this state to make property tax returns on intangibles as provided by section 146.050, RSMo 1949, in sufficient number to meet the needs of the respective counties. At the same time the director shall furnish to each treasurer a list of the intangible taxpayers of the respective counties who filed a state intangible tax return the preceding year.

"Section 2. 1. On or before the fifteenth day of January of each year every county treasurer shall mail to each intangible taxpayer as listed by the director of revenue, and to such other persons as he may have reason to believe may be possessed of taxable intangible property a form prescribed and furnished by the director of revenue, together with a brief statement of what is required of the taxpayer under the provisions of this act. Every county treasurer shall mail, on or before the first day of February of each year, to the Director of Revenue, a list of the additional names to whom he has mailed said form, which said list of additional names shall be added to the list held by the Director of Revenue as those who have intangible personal property subject to taxation.

"2. The county treasurer shall keep all such lists strictly confidential and shall not reveal the contents thereof to any person except as herein provided.

"Section 3. For the additional duties imposed upon county treasurers by section 2 of this act, they shall receive the

Honorable W. H. Holmes

following additional compensation, to be paid in the same manner and from the same funds as county treasurers are now paid provided said treasurers shall have used diligence in securing and preparing the additional list and shall have forwarded the same to the Director of Revenue.

"(1) In class four counties six hundred dollars per annum.

"(2) In class three counties having a population of less than twelve thousand five hundred, six hundred dollars per annum.

"(3) In class three counties having a population of more than twelve thousand five hundred but less than thirty thousand, eight hundred dollars.

"(4) In class three counties having a population of more than thirty thousand, one thousand dollars.

"(5) In class two counties, one thousand dollars.

"(6) In counties under charter form of government a compensation to be fixed by the County Council."

(Underscoring ours.)

Section 1 of said bill provides that the State Director of Revenue shall furnish forms to the county treasurers of class three and class four counties in this state to make property tax returns on intangibles. Said Section 1 also provides that each treasurer shall be furnished a list of intangible taxpayers.

In construing this section and the bill as a whole it must be noted it does not exclude county treasurers in third and fourth class counties adopting township organization.

Honorable W. H. Holmes

We also call to your attention the Legislature has made no other provision for distributing such tax forms to county treasurers. What is here said about Section 1 also applies to Sections 2 and 3 of said Bill No. 199. In Section 2 of said bill we refer you to lines two and three, where we find the following: "Every county treasurer shall mail to each intangible taxpayer as listed by the director of revenue * * *." (Underscoring ours.) Every county treasurer is all inclusive with no exception appearing. Again in said Section 2 we find the expression, "every county treasurer." Had it been the intention of the Legislature to exclude township organization counties in third and fourth class counties, it should have excepted such counties. This statute apparently applies to county treasurers in all third and fourth class counties in the state.


CONCLUSION

For the reasons above indicated we are of the opinion that House Bill No. 199, passed by the Sixty-sixth General Assembly, applies to all county treasurers in third and fourth class counties including county treasurers in counties adopting township organization.

Respectfully submitted,

GROVER C. HUSTON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

GCH/fh

BOND ELECTIONS: It is not necessary that the name of the county and state be included in the notice of the place of a special bond election if the notice names a locally well-known place for holding such election.

November 5, 1951

11-20-50

Honorable W. H. Holmes
State Auditor of Missouri
Jefferson City, Missouri

Attention: Mr. Alvin Papin,
Bond Clerk



Dear Mr. Holmes:

This will be the opinion you requested in your recent letter, respecting the validity of the notice for a special bond election held by Anderson Consolidated School District No. C-2 of McDonald County, Missouri, where the notice of said election did not state the name of the County of McDonald and State of Missouri where such Consolidated School District is located and where such bond election was to be held.

Your letter, containing a copy of the notice, reads as follows:

"Bonds in the amount of \$22,000.00, issued by Anderson Consolidated School District No. C-2 of McDonald County, Missouri, have been submitted to this Office for registration. A question has arisen concerning the sufficiency of the notice of election which is in words and figures as follows:

"N O T I C E

"NOTICE IS HEREBY GIVEN THAT A SPECIAL ELECTION WILL BE HELD THE 9th DAY OF JULY, 1951, FOR THE PURPOSE OF VOTING FOR OR AGAINST THE FOLLOWING PROPOSITION:

"Shall the Board of Directors of Anderson School District C-2 be authorized and empowered to borrow the sum of Thirteen Thousand Five Hundred Dollars (13,500.00) for the purpose of purchasing and installing a new heating plant; and issue

Honorable W. H. Holmes

negotiable bonds of said district to secure the payment of said loan; and levy against all taxable property within said school district a sufficient tax increase to pay the interest and retire said bonds as they become due.

"ALL LEGALLY QUALIFIED VOTERS OF THE ANDERSON C-2 DISTRICT ARE ENTITLED TO VOTE.

"THE POLLING PLACE DESIGNATED FOR SAID SPECIAL ELECTION WILL BE AT THE ANDERSON HIGH SCHOOL BUILDING AND THE POLL WILL BE OPEN FROM SIX (6) AND UNTIL SUNSET.

Signed Veda B. Pratt
Clerk of Anderson School
District C-2

"A SIMILAR NOTICE FOR \$8,500.00 bonds for the purpose of erecting an Industrial Arts Building was posted on the same date

"The question is whether or not the above notices are sufficient since the county and state in which Anderson School District C-2 is located has been omitted."

You have favored us with a copy of the transcript of the proceedings incident to this bond issue and the presentation of the bonds to you as State Auditor for registration.

It appears from the transcript that the Anderson Consolidated School District No. C-2 was organized in 1925 under the then existing statutes of Missouri, now included in Chapter 165, RSMo 1949, relating to "city, town and consolidated districts," particularly Sections 165.270 and 165.277 thereof, in McDonald County, Missouri.

Section 165.040, RSMo 1949, gives authority to consolidated school districts, such as Anderson Consolidated School District No. C-2 of McDonald County, Missouri, through their Boards of Directors, to borrow money and provide for elections for the voting of bonds and issuance thereof, first having given at least fifteen days' notice of any such election. Section 165.040, RSMo 1949, directs how the notice shall be given, but does not set out any form of notice. Said section, providing for the issuance of bonds, reads, in part, as follows:

Honorable W. H. Holmes

"For the purpose of purchasing schoolhouse sites, erecting schoolhouses, library buildings and furnishing the same, and building additions to or repairing old buildings, the board of directors shall be authorized to borrow money, and issue bonds for the payment thereof, in the manner herein provided. The question of loan shall be decided at an annual school meeting or at a special election to be held for that purpose. Notice of said election shall be given at least fifteen days before the same shall be held, by at least five written or printed notices, posted in five public places in the school district where said election shall be held, and the amount of the loan required, and for what purposes; it shall be the duty of the clerk to sign and post said notices.
* * * ."

One of the principal questions to be determined in answering your inquiry is whether the notice of a special bond election by a municipality or political subdivision in fixing the place of such election is mandatory and to be strictly construed requiring strict compliance, or whether it is directory and may be liberally construed under the terms of the statute providing for such notice so that a substantial compliance with the statute will be sufficient.

There is, we believe, a distinction to be drawn between the fixing of the place of the voting in a special bond election in the notice and the period of time a notice must be given preceding such election where a specified number of days or period is provided by the statute as to being mandatory or directory. Recently, our Supreme Court in the case of *State ex rel. City of Berkeley v. Holmes*, 219 S.W. (2d) 650, held that the number of days specified by statute for the publication of a notice of a special election to issue bonds was mandatory and that nothing less than the full number of days provided by the statutes would answer the statute. The statute in that case provided that "such notice shall be advertised by publication once a week for three consecutive weeks in a newspaper published in the City". The notice was actually published nineteen days. The Court held the election void. Commenting upon the section under which the notice was given in that case, 1.c. 653, the Court said:

Honorable W. H. Holmes

"Our Section 7369 does say that notice of such election shall be given in a certain specified way; and our conclusion is that the time of notice specified therein is a mandatory requirement which must be complied with to have a valid special election authorizing an increase in the indebtedness of the City. The Legislature was very specific in stating these requirements as to time of notice, and used mandatory language concerning them, and we do not think we should undertake to modify them or hold that anything less is a substantial compliance with them. Variations as to form of notice or of ballots, which could not mislead voters, may reasonably be held to be substantial compliance. * * "

Here, as has been observed, Section 165.040, RSMo 1949, provides that the notice of a bond election shall be given fifteen days before the election by at least five written or printed notices posted in five public places in the school district where the election shall be held. That was done in this election. The statute does not provide, however, that the name of either the county or the State of Missouri shall be stated in the notice following the corporate name of the consolidated school district in naming the place where the election shall be held. We believe, therefore, under the decision in the Berkeley case, supra, holding that the period for the time of publication for the election in that case was mandatory, because the statute provided the number of days the notice should be published, that here the terms of the statute are directory, and that it is not mandatory that McDonald County, Missouri, be designated as a part of the place where such election would be held, in addition to the definite statement that the polling place would be in the High School Building in the Anderson Consolidated School District No. C-2. But if it should, under any theory, be deemed an omission or a defect in the notice to not include the county and state in naming the place of a special election, the text writers and courts have written text and decisions to the effect that, if such provisions are not mandatory, a substantial compliance with the statute is sufficient, even though there are irregularities or omissions in a notice of a bond election. 18 Am. Jur. 248, 249, Section 110, on this subject, generally, states the following:

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"The effect of an irregularity in the giving of the prescribed notice may depend upon, or be affected by, the character of the election. It is clear that since an entire failure to give the notice required by statute does not necessarily avoid a general election, an imperfect or defective notice which does not mislead electors so that they lose the right to exercise their franchise certainly will not do so. It is equally clear in the case of special elections wherein the necessity for notice is so much more urgent that the rule as to compliance with statutory requirements in the giving of notice should be much more strictly enforced. Considerable liberality is, however, allowed even in these elections and it is a rule of pronounced authority that the particular form and manner pointed out by a statute for giving notice is not essential, provided, however, there has been a substantial compliance with statutory provisions. Following this rule, it has been held that where the great body of the electors has actual notice of the time and place of holding the election and of the questions submitted, the requirement as to notice is satisfied. Thus, the formalities of giving notice, although prescribed by statute, are frequently considered directory merely in the absence of an express declaration that the election shall be void unless the formalities are observed. This liberal rule is based upon the theory that where the people have actually expressed themselves at the polls, the courts are strongly inclined to uphold, rather than to defeat, the popular will. * * * "

The Appellate Courts of this State have had before them and have decided cases involving similar questions to the one here being considered, although the precise objection that a notice of a bond election was invalid because the county and state were not named in the notice designating the place where the election was to be held was not raised in such cases. However, it was in such cases held that notices very similar to the notices in the matter being considered here were valid. Some of the notices upheld named the city, county and state where a bond election was to be held, but failed to name the polling places. Others named simply the town where the election was to be held. The case of State ex rel. Mercer County, et al.

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v. Gordon, State Auditor, 242 Mo. 615, was such a case and was before the Supreme Court on the question that the notice for a county bond election failed to designate the polling places in the county where such election was to be held. The notice did name "the County of Mercer and State of Missouri" where the county bond election would be held, but failed to name the city or the polling places where the election would be held. The Court held the notice was not misleading and that the matter should be given a liberal construction, and that there was sufficient place stated where the election would be held. The Court so holding, l.c. 624, said:

"It is rare indeed that anyone desiring to cast a vote in a special election has any difficulty in finding the place where the election is to be held. Either those urging the adoption of the measure submitted or those desiring its defeat, will take such an interest in the result of the election that everyone who may desire to vote thereat will have no difficulty in finding the place where he should cast his ballot.

"As we understand the theory of respondent, he contends that in special elections held for any purpose, all provisions of the election law governing such special elections are mandatory and must be observed with the utmost strictness; otherwise, such special elections will be void. Such is not the spirit of the more modern adjudications on that subject. The law contemplates that everything necessary shall be done to afford the voters a free and fair opportunity to vote yes or no on the proposition submitted, and unless some mandatory statute has been violated, or something has been done or omitted which has deprived the voters of a free and fair expression of their will, such election should be upheld. * * * "

The case of State ex rel. Marlowe, Collector v. Lumber Company, et al., 58 S.W. (2d) 750, was before the Supreme Court primarily on the question of the payment of taxes in favor of the Morehouse School District in New Madrid County, Missouri. The principal question in the case and determined by the Court was whether the notice for an election to increase the tax levy in excess of the constitutional limit, which could only be increased by a vote of the taxpayers of the school district,

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at an election, lawfully called and held for that purpose, was valid or invalid because such notice did not name the place where the election should be held. The case is important here, since it makes a clear distinction between the necessity of a notice stating the time of holding such election and the place of holding such an election. The case is quite too lengthy for extensive quoting. We shall quote parts of the decision most appropriate to the question here as showing that the name of the place of the election in the notice is not mandatory and may be supplied by the record of the proceedings initiating and consummating such election. Perhaps it would be well for those interested to read the entire opinion in the Marlowe case to better observe the effect of the decision on the question of such distinction. The notice given by the Morehouse School District did not name the place of the election, but said the election should be held at "the usual place of holding elections for members of such board." Pertinent to the definite point before us here as to the notice specifying the place of the election, the Court, l.c. 752, said:

"In State ex rel. Gentry v. Sullivan, 320 Mo. 362, 8 S.W. (2d) 616, 618, the notice of an election to be held in a consolidated school district specified the place of the election as 'at Stoutland,' a village of some 300 people. The election was actually held at the Christian Church in that town by making public announcement on the street just before the voting began. As to this the court said: 'Before the voting commenced the county commissioner made a public announcement that the election would be held at the Christian Church. It was accordingly held at that place. No evidence having been adduced that any voter was deprived of his right to vote by reason of the general nature of the notice, no right was impaired or privilege denied, and we are, in all fairness, prompted to overrule this contention. In so doing we are not without a precedent therefor in our own rulings. State ex inf. Poage v. Higley (Mo. Sup.) 250 S.W. 61.'

"Defendant cites State ex rel. v. Martin, 83 Mo. App. 55, and Harrington v. Hopkins, 288 Mo. 1, 231 S.W. 263, but we find nothing therein justifying our holding the annual school election void for failure to sufficiently apprise the voters of the place where the election was held, and we rule this point against defendant."

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The case of State ex rel. v. Martin, 83 Mo. App. 55, cited in the last immediate quote was one of the Court of Appeals' cases cited by the Supreme Court in the case of State ex rel. City of Berkeley v. Holmes, State Auditor, supra, as holding a statute mandatory which prescribes a definite number of days in which the publication of a notice of a special election must be published. The only point before the Supreme Court and decided by the Court in the Berkeley case, supra, was on the question of the length of time of the publication of the notice for a special election. In the Marlowe case, supra, last above quoted, the Court states that nothing is found in the State ex rel. v. Martin case, supra, to hold the election in the Marlowe case void for failure to sufficiently apprise the voters of the place where the election was to be held, and ruled the point against the defendant because the notice in the State ex rel. v. Martin case, 83 Mo. App. 55, was treating only with the question of the number of days of the publication of the notice and had nothing to do with the fixing of the place of the election. The case of Harrington v. Hopkins, 288 Mo. 1, 231 S.W. 263, cited along with the Martin case in the Marlowe case, supra, does not definitely refer to the question here being considered, hence we pass it by.

The Supreme Court, in the case of State ex rel. Gentry, Attorney General v. Sullivan, et al., 8 S.W. (2d) 616, in quo warranto, upheld a notice of an election to organize a consolidated school district which stated merely that the election would be held "at Stoutland" which was the name of the town within the boundaries of the proposed consolidated district. The Court sustained the information and gave its judgment of ouster of the director on other grounds. However, in approving the sufficiency of the notice fixing the place of the election, the Court, l.c. 618, said:

"The concrete contention as to the regularity of the election is that the place where it was to be held was not designated, other than 'at Stoutland,' and that the notice was void in not being founded on the petition and plat; that, in the absence of a specific designation of the place where the election was to be held, the voters had no knowledge of the same until just before the voting began. The evidence discloses that Stoutland is a small village of not more than 300 people. Before the voting commenced the county commissioner made a public announcement that the election would be held at the Christian Church. It was accordingly

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held at that place. No evidence having been adduced that any voter was deprived of his right to vote by reason of the general nature of the notice, no right was impaired or privilege denied, and we are, in all fairness, prompted to overrule this contention. In so doing we are not without a precedent therefor in our own rulings. In *State ex inf. Poage v. Higley* (Mo. Sup.) 250 S.W. 61, under a state of facts similar to those at bar, we held that, where the place at which a consolidation school election was held was in a small town of not more than 300 people, a notice of a special meeting to vote on a consolidation which simply designated the town as the place of holding the same was sufficient."

In the notice of the election here being considered, the polling place was plainly set forth in the notice as being at "the Anderson High School Building". The case of *State ex rel. v. Hackman*, State Auditor, was before the Supreme Court, reported in 273 Mo. 670, on mandamus to compel the registration of bonds voted by the town of Memphis, Missouri, where it was charged that the election was invalid because the ordinance calling said election did not provide for the voting places for same, but said that the bond election should be held "at the usual voting places in each ward of said city". The Court held the election valid, and, in approving the form of the notice as to the general terms of naming the places where the election would be held, 1.c. 694, 695, said:

"Error is alleged in the failure of the board of aldermen to fix the polling places other than as 'the usual voting places in each ward in said city.' Neither in the respondent's return nor in the testimony, nor in the findings of the commissioner, is there anything to indicate that this election was--except in one instance to be adverted to later--not held at the usual voting places in said city. The contention peeps over the parapet, therefore, for the first time in respondent's brief, 'coming like the herald Mercury new lighted,' etc. This aside, however, we have had occasion, as has our courts of appeals, to carefully consider this objection, holding that we will presume, in the presence of a showing of fairness in the election and the consequent absence of any

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pretense of fraud, that the board performed its statutory duty in the matter here complained of and that the election was held at usual voting places in said city. We are apprised by the record that relator is a small city of less than two-thousand population. To presume, therefore, that the voters encountered any difficulty in ascertaining their respective places of voting or that they were in anywise hindered in the exercise of this right is not sustained by reason or in accord with human experience. * * *

The case of *Beauchamp v. Consolidated School District*, 297 Mo. 64, was before the Supreme Court of this State on the question of whether a notice of a proposed bond election by Consolidated School District No. 4, situated in the town of Avalon, Livingston County, Missouri, was sufficient which stated that the place of the voting would be "at the voting room in Avalon". The board in calling the election had provided that the matter of voting bonds would be submitted to the qualified voters of Consolidated District No. 4, a proposition to authorize the School Board to issue bonds for the purpose of repairing, remodeling and equipping the school building in Consolidated District No. 4 situated in the town of Avalon, Livingston County, Missouri. The notice of the election, however, was that the election should be held in the voting room in Avalon. The Court held the notice stating the place where the election would be held to be in the "voting room in Avalon" was sufficient. The Court, l.c. 72, said:

" * * * The place was sufficiently designated. The village named is a small one. The 'voting room' mentioned was known to all; had been used for years for the elections, annual and otherwise, in the district and all other local elections, as well; and there is no evidence that any voter was deceived or misled as to the place of voting, but quite the contrary. In such circumstances it is well settled that an objection such as is here made to the notice of the place of election is without force. * * "

The transcript of the proceedings resulting in this bond issue reveals in many instances and places that Anderson Consolidated School District C-2 was then and is now located in McDonald County, and that McDonald County was and is located in the State of Missouri, and that such bond election was to be held and was held in said school district in McDonald County,

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Missouri. We believe the notice given of said special election as supported by the record here is in substantial compliance with the statute requiring such notice, and was sufficient.

The transcript of these proceedings, page 13, contains a recital that the Circuit Court of McDonald County, Missouri, duly entered a pro forma decree adjudicating the validity of such bonds issued by the district under the provisions of Sections 108.310, 108.320, 108.330 and 108.340, RSMo 1949. These sections provide authority for such decree.

The certificate of the officers of said school district certifying the truth and regularity of the proceedings herein states:

"We further certify that there is no controversy, suit or other proceeding of any kind pending or threatened wherein or whereby any question is raised or may be raised, questioning, disputing or affecting in any way the legal organization of said municipality or its boundaries, or the right or title of any of its officers to their respective offices, or the legality of any official act shown to have been done in the foregoing transcript, or the constitutionality or validity of the indebtedness represented by the bonds shown to be authorized in said transcript, or the validity of said bonds, or any of the proceedings had in relation to the issuance or sale thereof, or the levy and collection of a tax to pay the principal and interest thereof."

It thus appears that, since no appeal was taken from such pro forma decree issued by said Circuit Court, its judgment, therefore, became, and now is, final, conclusive and binding upon the district issuing such bonds, and that the legality of such bonds is not subject to being questioned by any other court, and that the holder, or holders, of such bonds shall be conclusively deemed to be a holder, or holders, in due course, for values without notice of defect or infirmity. It is provided in Section 108.330, supra, that this shall be the status of such bonds upon the entering of such decree, if no appeal be taken therefrom.

It appears, therefore, that the proceedings out of which this bond issue arose, including the notice of the election to vote such bonds, are all, as we view them, in all respects legal.

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It further appears that the pro forma decree of the Circuit Court of McDonald County, Missouri, adjudging said bonds to be valid, is final, and that there is here no charge that any person was misled, or denied the right at said election to cast his or her ballot, and that the bonds are free of any legal controversy. It is our belief that no lawful reason or ground exists by which there should be any question to the sufficiency of the notice of said special election or the validity of the bonds, and that such bonds should be registered by the State Auditor.

CONCLUSION

It is, therefore, the opinion of this department, considering these proceedings and the above-cited authorities, that the notices of the special election given by Anderson Consolidated School District No. C-2 of McDonald County, Missouri, here considered, did sufficiently name the place where said special election would be held and where the question of issuing bonds in two instances by such district for the purpose of installing a new heating plant and for the purpose of erecting an Industrial Arts Building in the district would be voted upon in said district, are sufficient without stating the name of the County of McDonald and State of Missouri as a part of the place where said special election would be held, and that the bonds here submitted to your department for registration are valid and are eligible to registration by the State Auditor, and should be registered by him.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:VLM

REAL ESTATE BROKERAGE
BUSINESS LICENSE:
NONLICENSED COPARTNER
MAY BE IN SUCH BUSINESS:
COPARTNER MAY SHARE IN
PROFITS OF BUSINESS:

Copartnership real estate brokerage
business may be licensed when one
of the copartners does not hold real
estate broker's license. Where he
does not actively participate in
such business, such copartner may
share in profits of such business.

November 21, 1951

Mr. J. W. Hobbs
Secretary, Missouri Real
Estate Commission
Jefferson City, Missouri



Dear Mr. Hobbs:

Your recent letter, enclosing a letter of Commissioner Stephens', requesting an opinion of this office, has been assigned to the writer for answer. The pertinent part of Commissioner Stephens' letter is as follows:

"I have received an inquiry from a local abstractor as to whether or not he, without a license, would be considered in violation of the Real Estate License Act (Senate Bill No. 87) if he were to assume a silent partnership in a business with a real estate broker.

"He tells me that he will advance certain monies to this real estate broker and will participate in the annual profits, if any, only. He states that he will not do any of the things mentioned in Section 3 of the Act and that he will not have anything to do with the managership or policy of such brokers business.

"I do not believe that he will be violating Section 2 and 3 of the Act; however Section 15 of the Act reads 'No real estate broker shall pay any part of a fee, commission or other compensation received by the broker to any person for any service rendered by such person to the broker in buying, selling, exchanging, leasing, running or negotiating a loan upon any real estate, unless such a person is a licensed real estate salesman regularly associated with such broker, or a licensed real estate broker, or a person regularly engaged in the real estate brokerage business outside the State of Missouri.'"

Mr. W. Hobbs

Section 339.030, RSMo 1949, (Section 2 of the Act) reads as follows:

"A corporation, copartnership or association shall be granted a license when individual licenses have been issued to every member or officer of such copartnership, association or corporation who 'actively' participates in its brokerage business, and to every person who acts as a salesman for such copartnership, association or corporation." (Underscoring and quotation marks ours.)

We believe that the above-setout section of the statute by its terms allows and looks with favor upon the formation of corporations, copartnerships and associations for the carrying on of real estate brokerage business where one of the owners is not "actively" participating in the brokerage business and is not licensed. We are, therefore, of the opinion that a person not having a real estate brokers or salesman's license and not "actively" participating in the real estate brokerage of a real estate brokerage firm can be a copartner in such firm.

Section 339.010, RSMo 1949, (Section 3 of the Act) reads in part as follows:

"1. A 'real estate broker' is any person, copartnership association or corporation, foreign or domestic, who advertises, claims to be or holds himself out to the public as a real estate broker or dealer and who for a compensation or valuable consideration, as whole or partial vocation, sells or offers for sale, buys or offers to buy, exchanges or offers to exchange the real estate of others; or who leases or offers to lease, rents or offers for rent the real estate of others; or who loans money for others or offers to negotiate a loan secured or to be secured by a deed of trust or mortgage on real property."

The above-setout part of this section states that "a person" or business firm which is either a copartnership, association or corporation is a "real estate broker" when it does these things delineated therein. A license can be issued to any of the above

Mr. J. W. Hobbs

types of real estate brokerage firm when the terms set out in Section 339.030, supra, are complied with.

Section 339.150, RSMo 1949 (Sec. 15 of the Act) reads as follows:

"No real estate broker shall pay any part of a fee, commission or other compensation received by the broker to any person for any service rendered by such person to the broker in buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate, unless such a person is a licensed real estate salesman regularly associated with such broker, or a licensed real estate broker, or a person regularly engaged in the real estate brokerage business outside of the state of Missouri."

We do not believe this section applies to the proposition set forth in your letter, that is whether or not the silent partner, who will not "actively" participate in the real estate brokerage business, which will, under the terms you set forth, be a copartnership, be able to receive his share of the profits under the partnership agreement. He can, we believe, receive his share of the profits as the "partnership firm" will be the licensed real estate brokerage business.

CONCLUSION

It is the opinion of this department that a license may be issued to a real estate brokerage business in which a copartner (silent) does not have a real estate broker's license and does not "actively" participate in the real estate brokerage business; and that such partner may share in the profits of the copartnership business.

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ABE:mw

ROADS AND BRIDGES:
MANDAMUS NOT PROPER REMEDY
TO COMPEL RECONSTRUCTION OF
BRIDGES, WHEN:

Where bridges adjudged sufficient
and become part of road system of
the county under Sec. 242.350
RSMo 1949, are subsequently de-
stroyed, authority having charge
of bridges cannot be compelled by
mandamus to reconstruct bridges,
since such authority is allowed
discretion under this section.

March 13, 1951

Honorable Charles J. Hoover
Prosecuting Attorney
Grundy County
Trenton, Missouri



Dear Sir:

Your recent request for a legal opinion of this department
has been received, and reads as follows:

"I am being requested to institute a proceeding
in our Circuit Court to compel the proper auth-
orities to construct or reconstruct bridges on
public highways that have been washed out by
floods. Several public roads in the county
are impassable because the bridges are out.
Most of the bridges are over drainage ditches.
This takes in Medicine Creek, No Creek, Honey
Creek, Muddy Creek, and the two Grand Rivers
in this county.

"Some of the drainage districts have been dis-
solved and some have not. Some of the bridges
have been adjudged sufficient by the County Court
and have been taken over by the County Court in
accordance with Section 12354 R. S. 1939, as
amended by the Laws of 1949, page 260. The
particular provision of this statute provides
that when the drainage district constructs a
bridge adjudged sufficient by the County Court,
thereafter the bridge becomes a part of the
road over which it is constructed and the act
provides that the same shall 'be maintained
by the authority authorized by law to maintain
the road over which it becomes a part.' Of

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course, there are two drainage acts but our drainage districts are under circuit court organization and are governed by said Section 12354 instead of Section 12427, known as County Court organization.

"You are familiar with the fact that Grundy County has township organization.

"A great number of our bridges spanning drainage ditches have been taken over by the County Court because they were adjudged sufficient, etc. The bridges thereafter went out during flood times and the roads are now obstructed. I understand that a mandatory injunction is the proper remedy and that this proceeding is to be instituted by the prosecuting attorney. The question that I am concerned with is the obligation or the duty of the county to construct a bridge.

"To narrow my question, let it be assumed that we have a bridge where there is no longer a duty on the drainage district to construct, reconstruct or maintain the same. Then, what is the duty of a county having township organization to construct a bridge?

"I direct your attention to Section 8534 and 8538 R.S. 1939. Under the language of that section it would appear that the County Court is given a discretion in regard to what bridges shall be built and maintained at the expense of the county.

"It is my understanding that the County Court has discretion which will not be interfered with; that the discretion is with the County Court to determine whether a bridge is a matter of necessity or not. I appreciate such rulings but we have a number of roads obstructed at this time by reason of bridges being washed out and they have been muchly traveled roads. They are roads where a number of farm families live and it interferes with communications, with markets, schools, churches, etc. The necessity of the bridge is not questioned.

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"It would appear to me where the grave necessity of a bridge is not disputed that the County Court may no longer refuse to construct a bridge. Of course, the next question would be available funds, but assuming that there is a grave public necessity for the construction of a bridge, could the County Court, in its discretion, refuse to raise the necessary taxes to defray the expense?

"To state my question in other words, can the County Court or the County be compelled by mandatory injunction or by mandamus proceeding to construct a bridge on a public county road where the necessity for the bridge is beyond question.

"I am assuming that you have had this question before and that I will not impose upon your good time due to the fact that an opinion from your office is in existence. Under county court organization there is a case of Camden Special Road District, et al. vs Willow Drainage District, et al., 199 S. W. 716, which provided that the commissioners may do certain acts, including the building of all necessary bridges and the court held that even though there was a discretion, nevertheless, the district may be compelled to perform an act which would restore the public use of the road.

"To make the question that I am interested in more pointed, can a county be compelled to build a bridge where there is grave public necessity for the existence of the bridge, first, on a county road, and second, on a township road."

From your letter it appears that a number of bridges over drainage ditches in Grundy County (under the provisions of Section 12354, Laws of 1949, page 260) have been adjudged sufficient by the county court, have become a part of the public roads over which they were constructed, and that the county has become liable for maintaining such bridges. It further appears that floods have washed away or destroyed many such bridges, and that since they are part of widely traveled road systems of the county, your chief inquiry now is whether or not the county court may be compelled by mandatory injunction or mandamus to reconstruct the bridges. This inquiry does not state whether you refer to proceedings to compel the county court to reconstruct all bridges

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of the county road system which have been destroyed, or whether you refer only to those bridges which have been adjudged sufficient and have become a part of the county roads for which the county is obligated to maintain, under Section 12354, supra.

In a recent opinion of this department rendered to the Honorable J. Harry Latham, Prosecuting Attorney of Andrew County, it was held that bridges across drainage ditches in drainage districts organized by the circuit court, are maintained by the county where the bridges were adjudged sufficient by the county court, but those not adjudged sufficient were to be maintained by the drainage district in which they were located.

It is assumed that you refer only to those bridges adjudged sufficient, and the county's obligation to maintain same has already become fixed.

Section 12354 of the 1949 Laws of Missouri, page 260, supra, now Section 242.350, RSMo 1949, reads as follows:

"All bridges contemplated by this article and all enlargements of bridges already in existence shall be built and enlarged according to and in compliance with the plans, specifications and orders made or approved by the chief engineer of the district. If any such bridge shall belong to any corporation, or be needed over a public highway or right of way of any corporation, the secretary of said board of supervisors shall give such corporation notice by delivering to its agent or officer, in any county wherein said district is situate, the order of the board of supervisors of said district declaring the necessity for the construction or enlargement of said bridge. A failure to construct or enlarge such bridge within the time specified in such order shall be taken as a refusal to do said work by said corporation, and thereupon the said board of supervisors shall proceed to let the work of constructing or enlarging the same at the expense of the corporation for the cost thereof, which costs shall be collected by said board of supervisors from said corporation, by suit therefor, if necessary. But before said board of supervisors shall let such work, it shall give some agent or officer of said corporation, now authorized by the laws of this state to accept

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service of summons for said corporation, at least twenty days' actual notice of the time and place of letting such work. Any owner of land within or without the district may, at his own expense, and in compliance with the terms and provisions of this article, construct a bridge across any drain, ditch, canal or excavation in or out of said district. All drainage districts shall have full authority to construct and maintain any ditch or lateral provided in its 'plan for reclamation,' across any of the public highways of this state, without proceedings for the condemnation of the same, or being liable for damages therefor. Within ten days after a dredge boat or any other excavating machine shall have completed a ditch across any public highway, a bridge adjudged sufficient by the county court of said county or counties shall be constructed over such drainage ditch where the same crosses such highway, and after such bridge has been constructed it shall become a part of the road over which it is constructed and shall be maintained by the authority authorized by law to maintain the road of which it becomes a part. When any drainage district has heretofore constructed or shall hereafter construct a bridge over a drainage ditch where the same crosses any public highway, said drainage district shall not be under obligation thereafter to further maintain or reconstruct any such bridge or bridges for more than twenty years after it first constructed or constructs such bridge at said place. If said bridge has been constructed by the drainage district and has become a part of said road and is then destroyed the authorities having control of the road are authorized, if they desire, to reconstruct such bridge, provided, however, the word corporation as used in this section shall not apply to the state or any political or civil subdivision thereof."

(Underscoring ours.)

While we fully appreciate the facts outlined in your letter as to the bridges being destroyed, the great inconveniences caused the traveling public thereby, and that there cannot be any question as to the necessity of such bridges, you seem to assume that from such facts it is the duty of the authorities having charge of the bridges to reconstruct same, and the implication is that the duty

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of such authority is a ministerial one, and that it might be compelled either by mandatory injunction or mandamus to have said bridges repaired.

We cannot agree with your theory, since it seems that the duty of the authority having charge of the bridges is not merely a ministerial duty, but under the provisions of the above statute, particularly that part we have underscored, it appears that such authority has been given discretion as to what bridges, if any, it may reconstruct.

Where the authority is allowed to exercise its discretion in matters pending before it, and we feel that it is allowed discretion in the matter of constructing bridges, mandamus is not the proper remedy to compel it to construct bridges, this principle having been decided in the case of *State ex rel. Bartle v. Coleman*, 33 Mo. App. 470, at l. c. 474, the court said:

"The substantial question in the case arises upon the construction which must be placed on the following section of the statute concerning bridges: Section 4326: 'The County court shall, whenever it is necessary, without delay, make an appropriation to repair any public bridge in the county, and whenever any bridge shall be repaired, the like preliminary steps shall be had as in case of building a bridge; and the commissioners shall have the same powers, and proceed in like manner, as the commissioner for building a bridge.' The italics in the quotation are our own. The relators contend that the law leaves no discretion whatever in the county court. They maintain that the words whenever it is necessary are synonymous with the words whenever it is out of repair; that therefore the case is governed by the principle, that whenever an imperative duty is imposed on public officers by law, its performance may be enforced by mandamus, as has been frequently decided in this state. State ex rel. v. School Directors, 74 Mo. 22; State ex rel. v. Meyer, 80 Mo. 601; State ex rel. v. County Court of Gasconade, supra, and has been decided by us in the recent case of State ex rel. v. Baker, 32 Mo. App. 98. To this view we cannot accede, as it seems opposed to the context of other sections of the law on the same subject. The words, 'whenever it is necessary,' certainly leave the necessity to be determined by some one. Were it otherwise, we would be compelled to hold that the county court

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can be forced to repair a bridge, when, owing to the physical facts of the case, such repair is wholly impracticable, as seems to be the case upon the facts developed at the hearing of the case at bar. We cannot hold that the legislature intended a result so totally opposed to the interests of the community, as long as the section admits with equal reason of another and more rational construction. The view we hold to be the correct one gains additional strength by two considerations. In the next succeeding section, referring to bridges to be kept in repair by contract, the words are, 'if any public bridge require repairing,' thus showing that the legislature used unequivocal terms in the proper case. On the other hand, the section under consideration requires that the like preliminary steps shall be had in cases of repairs as in cases of building bridges. One of such steps is a preliminary estimate or bid, upon the receipt of which the county court may or may not in its discretion make an appropriation under section 4317 of the law. This being so, it is not evident how a mandamus to repair could aid the relators, since the appropriation for such repairs is left to the discretion of the county court. We must therefore conclude that the words 'whenever it is necessary' invest the county court with a reasonable discretion to determine the necessity of the repair. Courts have gone to great length in controlling the discretion of municipal authorities, where they have exercised such discretion in a manner grossly oppressive. * * *

In view of the foregoing, it is our thought that when the authority having charge of the maintenance of the bridges, after being properly requested to reconstruct bridges over drainage ditches as noted above, that mandamus is not the proper remedy to compel the authority to reconstruct said bridges, since the provisions of Section 242.350, supra, leave the matter of reconstruction of such bridges within the discretion of such authority.

Since it appears that the question as to whether the county court might in its discretion refuse to raise the necessary taxes to defray the expense of reconstructing the bridges, presupposes that the authority having charge of said bridges as noted above, might be compelled by legal proceedings to reconstruct the bridges, we feel that this question is premature, and in the light of our

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discussion above, that such question is not proper, or necessary to a determination of the chief inquiry of the opinion request. For these reasons, we believe it is unnecessary to discuss the question further.

CONCLUSION

It is therefore the opinion of this department that in a county where bridges over drainage ditches originally constructed by drainage districts of said county, have been adjudged sufficient by the county court, and have become a part of the road system of the county under the provisions of Section 242.350, RSMo 1949; and that subsequently thereto said bridges are destroyed by floods, that the authority having charge of the maintenance of same fails or refuses to have said bridges reconstructed, mandamus is not the proper remedy to compel the authority to have said bridges reconstructed, since the authority has some discretion under the provisions of Section 242.350, supra, as to whether or not it shall take such action.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

PNC:hr

CONSTITUTIONAL LAW:

The legislature may authorize ~~the~~ county court to increase the tax levy for hospital purposes without a two-thirds vote of the people as provided by Section 11(c), Article X, Constitution of Missouri.

June 6, 1951

6-7-51

Senators John Hoshor and
Leo J. Rozier
Missouri Senate
Capitol Building
Jefferson City, Missouri



Dear Sirs:

Reference is made to your recent request for an opinion of this department which request reads as follows:

"Please find enclosed copy of proposed legislation which repeals and re-enacts section 205.200 and raises the ceiling on the amount that can be levied by hospital boards in counties in the state of Missouri.

"I wonder if you would be so kind as to look over this proposed law and inform us whether or not in your opinion it conforms with the Constitution of Missouri, Article 10 Section 11 (c).

"Some of the law makers are of the belief that this proposed legislation enables the county court to make this levy on certification of the hospital board without a vote of the people. The question now arises as to whether or not this levy can be levied without a vote of the people."

House Bill No. 229, the proposed legislation which you have referred to reads as follows:

"Section 1. That section 205.200, RSMo 1949, be and the same is hereby repealed and that one new section be enacted in lieu thereof, to be known as section 205.200, and to read as follows:

"205.200. Except in counties operating under the charter form of government, the county court in any county wherein a public hospital shall have been established as provided in section 205.160 to 205.340, shall levy annually a rate of taxation on all property subject to its taxing powers in excess of the rates levied for other county purposes to defray the amount required for the maintenance and improvement of such public hospitals, as certified to it by the board of trustees of the hospital; the tax levied for such purpose shall not be in excess of twenty cents on the one hundred dollars assessed valuation. The funds arising from the tax levied for such purpose shall be used for the purpose for which the tax was levied and none other."

Your question requires an interpretation of Article X, Section 11(c), of the Constitution of Missouri, 1945. This section embodies two distinct methods of increasing the tax levy and for reference purposes we divided it into part one and part two as follows:

Part one:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law; * * *."

Part two:

"* * *and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers, in excess of the rates herein limited, for library, hospital, public health,

recreation grounds and museum purposes."

After carefully considering the above constitutional provision, we believe that the obvious purpose of the provision is to provide two methods of increasing the tax levy limited by the constitution. One method being by a two-thirds vote of the qualified electors voting therefore for all county purposes, and that the tax levy as limited may be increased without a vote of the people for the specific purposes set forth in this provision.

By reference to the discussions and debates of the members of the Constitutional Convention, we believe that our conclusion is substantiated that part two has no reference or connection in any way with part one but is an additional exception to the constitutional limit of a tax levy and is a further and distinct method of increasing the tax levy for library, hospital, public health, recreational grounds and museum purposes.

The following quotations from the debates of the Constitutional convention clearly indicate that that body understood that Section 11(c), should provide that taxes should be increased above the limit fixed by the Constitution for (1) all county or public purposes by a two-thirds vote of the people and (2) for these specific purposes by any method as may be authorized and prescribed by state legislature.

"MR. MOORE: Judge, I wanted to ask you this question. I am very heartily in favor of the principle of your amendment but I don't quite get it through my head, maybe it is a little thick, why we should strike out the words 'public purposes' and insert these specific items. Now, let me ask you this, did the Committee have in mind that the first part of this section, by a two-thirds vote, they could levy additional taxes within the limitations prescribed by the Legislature for any public purpose? Then under general law they could do this without a vote of anybody for these specific items.

"MR. MAYER: Yes, if the Legislature authorized it.

"MR. MOORE: Now, do you have enough specific items listed, that is the thing I am wondering?

"MR. MAYER: Well, we have I think, all of the specific items that were urged before the Convention as being those that should be put in. The reason these were not put in, we all felt that 'public purposes' covered it and the Committee thought that was too broad and took those words out and I reinserted these words.

"MR. MOORE: Well of course all of the public purposes would mean that the Legislature might levy cities without a vote of the people and levy a tax for any purpose that was public for building a building or any other public purpose and it was believed that that ought to come under a two-thirds vote.

"MR. MAYER: Thank you.

* * * * *

"MR. ALLEN: Mr. President, I desire to speak on Mr. Phillips' amendment. I was a member of this Committee and it was the unanimous consensus of the opinion of this Committee that ad-valorem taxes were fast becoming obsolete and a relic of barbarism, that modern taxation was attempting to get away from ad-valorem taxes, and yet this same Committee, not only proposes to take off the present constitutional limitations on these ad-valorem taxes, but in effect, invites the people and the Legislature itself to use those ad-valorem taxes and use that theory of taxation for these purposes, hospital and public health, and the purpose that Judge Mayer added by his amendment this morning and which I supported.

* * * * *

"MR. RIGHTER: The amendment offered by Mr. Allen any myself would exempt Kansas City from the effect of the proviso beginning at line 26 of Section 11 on page 6 of File 19. Now, as all of the delegates have undoubtedly noted, the section first sets forth the amount of taxes that is based on the hundred

dollars valuation that municipalities, counties and school districts and for purposes other than school district, local taxing units have a right to levy. But the proviso beginning at page 26 contains two separate ideas. The language from line 26 to line 32 provides in effect that any municipality, county or school district, by the vote of two-thirds of those voting on the subject, may increase any of the rates specified. For example, in the case of school district the rate specified is a dollar so that if a two-thirds vote could be secured authorizing such an increase, the rate could be increased to two dollars. As a matter of fact, theoretically, at least, it could be increased to ten dollars and twenty dollars. Of course, that would not be done. That is out of the question.

* * * * *

"Well now, the second part of the proviso starts at the bottom of page 6 in line 32 and that proviso for no vote by anybody. It simply provides that we authorized, by law, any municipality, county or other political subdivision may levy a rate of taxation on all property subject to its taxing power in excess of the rates herein limited for library, hospital, public health. I think the words 'other public purposes' were stricken out and 'public recreation' and 'museums' were inserted. So that under that proviso in any county or other school district or other taxing unit in this state, if the Legislature could be induced to pass a law authorizing it the taxes could be increased without limit. So that we are faced here with a fundamental question of public policy in this section 11. Do you want to put a ceiling on the power to tax as was done in 1875 or do you wish to have no ceiling at all?

* * * * *

"MR. RIGHTER: The provision in the first proviso, the provision of the first proviso, from lines 26 to 32 at the bottom of Page 6 are entirely independent of the proviso at the top of Page 7 and the Legislative assembly is not essentially concerned with the

first proviso at all. People of the communities, I read this, can go to the polls and by a two-thirds vote of those voting, can increase the taxes of any of these taxing units indefinitely without the General Assembly doing a thing.

* * * * *

"MR. MAYER: Mr. President, I hope this amendment of Mr. Phillips will not be adopted. These purposes for which the Legislature may authorize the issuance or the increase of the levy are all purposes in which the public are very deeply interested. They usually will not take a very large levy. It isn't as if they were going to build a lot of buildings and all that sort of thing. It seems to me that there is plenty of safeguard if the people elect their whole county courts. They can't do this except as authorized by the Legislature and under such limitations as the Legislature may prescribe. I don't see why we should require a two-thirds vote to increase a levy of millions say for public health or for a library. It seems to me we are going along in distrust of our local people when we do that. I hope the amendment will be defeated.

"MR. GARTEN: Mr. President, it occurs to me that this amendment is already cared for by the first part of this because it says in the first part that a rate of taxation on any of these local purposes can be set by two-thirds vote, and then here we go on and say that a rate of taxation for libraries, hospitals, and etc., can be set by two-thirds vote. We will surely - well it seems to me the first part of this provision would cover the latter the way it is amended and if this is the purpose of Mr. Phillips, he would better attain it by striking out the last part of this section as something superfluous.

"MR. PRESIDENT: Have you finished?

"MR. GARTEN: Yes.

"MR. SHEPLEY: Mr. President, it occurs to me that this amendment should not be adopted, and

if this should be adopted you would accomplish almost the opposite from what the Committee had in mind. You tell the people in the first proviso that if two-thirds of those voting at an election want to do so they can authorize for their respective purposes, an increased rate. Then you go in the next proviso and ask if Senator Phillips amendment should be adopted you say but, if it happens to be for these particularly desirable purposes, you can only do it if the General Assembly tells you that it may, and for that reason, I think it is most inadvisable and should not be adopted."

* * * * *

The above excerpts are just a few of the many in this record which conclusively support the interpretation that Section 11(c), of Article X of the Constitution, provides two distinct methods of increasing the levy.

Therefore, in view of the above interpretation of Section 11(c), Article X of the Missouri Constitution, we are of the opinion that House Bill No. 229, conforms with the Constitution by authorizing the county court to levy a tax which may be in excess of the constitutional limitation for hospital purposes.

CONCLUSION

Therefore, it is the opinion of this department that House Bill No. 229, which raises the ceiling on the amount that can be levied for hospital purposes conforms with Section 11(c), Article X, Constitution of Missouri, 1945, which authorizes the legislature to enact a provision granting the county court the power to increase the tax levy without a two-thirds vote of the people when the amount of the increase is also fixed by the legislature.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PUBLIC ADMINISTRATORS: Public Administrator, upon re-election, must furnish new bond to qualify. Bond of prior term remains in force and effect until new bond is furnished.

PROBATE COURT:

October 9, 1951

10-11-51

Honorable Robert L. Hoy
Prosecuting Attorney
Saline County
Marshall, Missouri



Dear Mr. Hoy:

We quote from the letter which you had attached to your request for an official opinion of this department, as the questions presented are found therein. This letter reads as follows:

"I was elected Public Administrator of Saline County, Missouri, for the term from January 1, 1945 to January 1, 1949; and again was elected for the term beginning January 1, 1949 to January 1, 1953. I served the first term and am now serving in the third year of the second term. I furnished a surety bond for \$10,000.00 when first taking office, and that bond was continued by renewal premiums until the present time and still is in force and effect. I furnished no new bond at the beginning of the second term, both I and the local Agent of the Surety Company, thinking that the mere continuation of this original bond sufficiently met the statutory requirements. However, on or about the middle of the third year of my second term, the State Auditors advised that in their opinion this original bond did not cover such estate as were begun and handled in the second term but covered only the estates begun in the first term; so, at that time (about the middle of the third year of the second term), a second bond was furnished and is and has been in force and effect since then.

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"1- Does the first bond cover only the estates handled in the first term?

"2- Does the first bond, continued on into the second term, cover the estates begun and handled in the second term as well as those begun in the first term and continued on into the second term?

"3- Was the second bond necessary?

"4- Was the second bond, written and filed about the middle of the third year of the second term, liable for the estates begun and handled in the second term during the portion of the second term prior to the time the bond was written? (Was there any liability on the second bond for the Public Administrator's handling of second-term estates prior to the issuance of the bond?)

"5- Does the Probate Court have the right to allow credit to the Public Administrator from the several estates being handled a pro-rata reimbursement totalling the cost of the bond premium which has been paid personally by the Officer, or is this premium cost one that must be borne personally by the Officer? (Are the several estates being handled liable for their several pro-rata premium cost of the Officer's bond?)

"6- Does the County Court have the right to pay this bond premium?"

Section 461.780, RSMo 1949, provides for the election of a public administrator and further provides that before entering on the duties of his office, he shall take the oath and enter into bond to the State of Missouri. This section reads in part:

"Every county in this state, and the city of St. Louis, shall elect a public administrator at the general election in the year 1880, and every four years thereafter, who shall be ex officio public guardian and curator in and for his county. Before entering on the duties of his office, he shall take the oath required by the constitution, and enter into bond to the

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state of Missouri in a sum not less than ten thousand dollars, with two or more securities, approved by the probate court and conditioned that he will faithfully discharge all the duties of his office, which said bond shall be given and oath of office taken on or before the first day of January following his election,
* * * *"

There is no Missouri constitutional or statutory authority which distinguishes between an official elected for the first time and one who is re-elected. Such being the case, we feel that the general rule stated by the court in *State ex rel. v. Stafford*, 43 P. (2d) 636, 1.c. 639, 99 Mont. 88, is controlling. This rule is stated as follows:

"Our statutes make no distinction between an official elected or appointed for the first time to office and those re-elected or re-appointed; all must qualify in the manner prescribed, or a vacancy occurs in the office, and this is the general rule. 22 R. C. L. 452. If an officer 'is re-elected he is directed to qualify anew, the same as if another were elected.' * * * By not doing this the office becomes vacant.' *Wapello County v. Bigham*, 10 Iowa, 39, 74 Am. Dec. 370."

Section 461.780, supra, specifically provides that the public administrator shall enter into bond before entering upon the duties of the office. There was no new bond entered into in the instant case until sometime during the third year of the second term. Since there is no distinction between election for a first term and re-election and since a bond must be entered into in order to duly qualify for a second term, it must be concluded that the public administrator under consideration did not duly qualify for his second term until sometime during the third year of said term.

Now we assume that there was no appointment of an individual to the office of public administrator who duly qualified prior to the time that the public administrator elected for a second term did enter into a new bond. We must then inquire as to the status of the public administrator from the beginning of his alleged second term until the time he duly qualified by entering into a new bond.

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It is true that Section 461.780, supra, providing for the election of a public administrator for a term of four years, fails to specifically provide that said officer shall continue in office until his successor has been duly elected or appointed and qualified. However, Section 12 of Article VII, Constitution of Missouri, 1945, provides that "except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified." Section 105.010, RSMo 1949, is a statutory provision to the same effect. No constitutional or statutory provision can be found which would exclude public administrators from the operation of this rule. Therefore, in view of the above, we conclude that the instant public administrator continued to hold the office during the alleged second term by virtue of his election to the first term until that time during the second term that he requalified by giving the new bond.

Now for determination comes the question of the surety's liability upon the bond given at the time the public administrator qualified for his first term. The rule in Missouri in such instances is discussed and stated in the case of Town of Canton v. Bank of Lewis County, 92 S.W. (2d) 595, 338 Mo. 817, as follows at l.c. 599:

"* * *Appellants have cited cases which we deem controlling in this case. State ex rel. v. Kurtzeborn, 78 Mo. 98, was an action on a constable's bond. The default occurred long after the term of two years, for which the constable had been elected, had expired. A successor had not been elected and qualified as prescribed by law. This court in that case said: 'The constable was elected in November, 1874, and his term consequently expired, under statutory provisions, two years thereafter, or in November, 1876. But under another statutory provision, he continued in office, until his successor was elected and qualified. Wag. Stat. 963, § 1. The conversion of the money collected occurred, according to the petition, January 28th, 1877, and this suit was brought January 6th, 1879. Under the section just mentioned, Kurtzeborn's term of office did not expire until his successor was elected and qualified.

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He, therefore, continued to be constable, and his sureties to be bound, up to the time he converted the money collected; for the provisions of the law just cited are to all intents and purposes, as much part and parcel of the bond, as if so nominated therein.' In the case of Long v. Seay, 72 Mo. 648, bondsmen were held liable on the bond of a treasurer of a school board who had been elected for one year but had held office for three years. To the same effect, see State ex rel. v. Smith, 87 Mo. 158, loc. cit. 160. The general rule is thus stated in 46 C.J. 1072, § 408: 'Where the bond is conditioned for the discharge of duties by the officer until a successor has been elected or appointed and has qualified, or where it is provided by law that an officer shall discharge the duties of his office until a successor has been elected or appointed and has qualified, the general rule is that, where an officer so holds over, the liability on his bond continues until such successor has qualified, although in some jurisdictions it is held that the liability extends only for such further time after the expiration of the term as is reasonably sufficient for the election or appointment and qualification of a successor.' * * *."

Applying the above rules to the instant case, it is our opinion that the surety remains liable upon the first bond until that time when the second bond was given by the public administrator during his second term. This view is further supported by the language of the court in the case of State ex rel. v. Stafford, cited earlier in this opinion, where the court continued at l.c. 639 by saying:

"A situation similar to that here considered was disposed of in Baker City v. Murphy, 30 Or. 405, 42 P. 133, 35 L.R.A. 88, wherein it appears that the defendant Murphy was re-elected city treasurer; he failed to requalify but continued to hold the office. He contended that he was holding under his second term and alleged that 'said plaintiff, Baker City, its mayor and common council, acknowledged said Murphy and held him out to the world * * *

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as his own successor.' The court held, in effect, that Murphy could only become his own successor by requalifying; that he had held under one continuous term--his original term--which, under the statutory authority to hold until his successor was elected and qualified, was prolonged until such time as his successor was appointed and qualified to fill the vacancy he created by failure to qualify, and, as the statute became a part of the contract, the original sureties on his bond were liable for his defaults for the full extended term. See, also, State v. Lansing, 46 Neb. 514, 64 N. W. 1104, 35 L. R. A. 124; Bullock v. State, 65 N.J. Law, 557, 47 A. 62, 86 Am. St. Rep. 668."

Therefore, in answer to your first question regarding whether or not the first bond covered only the estates handled in the first term, we feel that under the facts presented it not only covered those handled during the first term but also those handled until that time that the public administrator qualified for his second term by entering into a new bond. We further feel that this also sufficiently answers your second question.

Your third question regards the necessity of the second bond. As specifically required by Section 461.780, it was necessary that the second bond be given in order for the public administrator to duly qualify for his second term. Until such a time that he did, the office was subject to such consequences as a failure to qualify for office produces.

Regarding the fourth question, we are unaware of any statutory authority or principle of law which would warrant holding that the second bond would cover liability for estates begun and handled prior to the execution of same. We are of the opinion that the second bond has no retroactive effect.

Regarding your fifth question, we can find no statutory authority which expressly or impliedly gives the Probate Court the right to allow a pro-rata reimbursement from the several estates being handled which would total the cost of the premium of the bond furnished by the public administrator.

An official opinion rendered by this department under date of April 10, 1941, and addressed to the Honorable James D. Clemens, provides the answer to your sixth question. It

Honorable Robert L. Hoy

was held therein that "the County Court is not authorized to pay the premium on the bond required of a public administrator." Please find enclosed a copy of this opinion.

CONCLUSION

It is therefore the opinion of this department that:

1. A public administrator elected for a second term to succeed himself must furnish a new bond in order to duly qualify for the office for the second term.
2. Upon re-election of a public administrator to succeed himself, the bond given by him at the beginning of his first term remains in full force and effect until such time as he duly qualifies for the second term by furnishing a new bond.
3. The bond furnished at some time during the second term can have no retroactive effect and will not cover any liability occurring during the second term prior to the time the bond is furnished.
4. The Probate Court is without authority to allow to the public administrator a pro-rata reimbursement from the several estates handled which would total the cost of the premium of the bond furnished by said public administrator.

Respectfully submitted,

RICHARD H. VOSS,
Assistant Attorney General

RHV:ba

APPROVED:



J. E. TAYLOR
Attorney General

Encl.

ABSENTEE BALLOTS: An absentee ballot may be cast in a school reorganization election. It is the duty of the County Board of Education to supply ballots in a school reorganization election.

January 31, 1951

1-31-51

Honorable William L. Hungate
Prosecuting Attorney
Lincoln County
Troy, Missouri



Dear Sir:

Your recent request for an official opinion has been assigned to me to answer.

In your request you asked two questions: First, can absentee ballots be cast in a school reorganization election? Second, if absentee ballots can be cast in a school reorganization election, what official should issue said absentee ballots?

In answer to your first question I would direct your attention to Section 112.010, R.S. Mo. 1949, which section states:

"Any person being a duly qualified elector of the state of Missouri, other than a person in military or naval service, who expects to be absent from the county in which he is a qualified elector on the day of holding any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, or any person who through illness or physical disability expects to be prevented from personally going to the polls to vote on election day, may vote at such election as herein provided."

From the above section you will note that absentee ballots may be cast by a person who expects to be absent from the county in which he is a qualified elector on the day of the holding of a special election, "at which questions of public policy are submitted." Inasmuch as a school reorganization election is a special election and inasmuch as it is one at which questions of public policy are submitted, it is our opinion that absentee ballots may be cast at a school reorganization election.

Honorable William L. Hungate

In reference to your second question I would direct your attention to Section 112.020, R.S. Mo. 1949. This section deals with the application for an absentee ballot and states, in part, that the voter expecting to be absent from his county on election day shall apply for an absentee ballot to "the County Clerk or, where existing, to the Board of Election Commissioners, or other officer or officers charged with the duty of furnishing ballots....."

Section 112.030, R.S. Mo. 1949, in connection with this particular point has the same provision as the preceding section.

I would now direct your attention to Section 165.680, R.S. Mo. 1949. That portion of the above section which is pertinent in this instance reads:

"..... The county board of education shall select and designate the voting place or places in each proposed enlarged school district and shall, also, select and appoint three judges and two clerks of such elections for each polling place, all such persons to be residents of the proposed enlarged school district. The judges and clerks shall be sworn and the election otherwise shall be conducted in the same manner as elections for state and county officers. Each judge and each clerk shall receive compensation of five dollars per day. The county board of education shall supply ballots, polling books and all other materials required in the election. The cost of election supplies and the compensation of election officials shall be charged to each component district embraced in the proposed enlarged district in proportion to the total assessed valuation and shall be paid from the incidental fund. All qualified voters resident in the proposed enlarged school district shall have the right to cast their ballots for or against the proposal. The ballot shall be in the following form:

- ☐ For the proposed enlarged district
- ☐ Against the proposed enlarged district
Check with cross mark (X) in the square desired.

The judges and clerks of the election shall certify to the secretary of the county board of education the total votes for and the total votes against the proposed enlarged district. A majority affirmative vote of the total votes cast shall be required for adoption of the proposed enlarged district. (L. 1947 V II p. 370 Sec. 8)."

Honorable William L. Hungate

From the above it would appear that the absentee ballots in the school reorganization election should be supplied by the county board of education.

CONCLUSION

An absentee ballot may be cast in a school reorganization election.

It is the duty of the county board of education to supply ballots in a school reorganization election.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

HPWab

BONDS:
OFFICERS:
CIRCUIT CLERKS:
RECORDER OF DEEDS:

In counties of fourth class circuit clerk and ex officio recorder of deeds must give two separate and distinct bonds and cannot give one bond conditioned upon the faithful performance of his duties in both offices.

January 31, 1951

2-3-51



Honorable William L. Hungate
Prosecuting Attorney
Lincoln County
Troy, Missouri

Dear Mr. Hungate:

Your recent opinion request reads in part as follows:

"This is a 4th class county and the Circuit Clerk is ex-officio recorder of deeds. As I read the statutes the Clerk gives a bond of at least \$5,000.00 or more to be set and approved by the Circuit Judge, and then before he can act as recorder he should give a bond of from \$1,000.00 to \$5,000.00 as determined and approved by the County Court.

"The practice has been for the Clerk to give one bond for \$6,000.00 written for the Circuit Clerk and ex-officio Recorder of Deeds. There is nothing in this to indicate what amounts are set aside for each office. Apparently they believe they are giving the \$5,000.00 minimum bond as Clerk and \$1,000.00 minimum as Recorder although this is not spelled out in the bond.

"Can one bond be prepared to cover both offices? Would this bond be considered as covering both offices? Kindly advise the proper steps required to be in compliance with the statutes on bonds for both of these offices."

Lincoln County is a county of the fourth class. Circuit clerks of counties of the fourth class also act as ex officio recorders as provided for by Section 59.090, RSMo 1949 as follows:

Mr. William L. Hungate

"In all counties of the fourth class, the clerks of the circuit court shall be ex officio recorder for their respective counties. (L. 1945 p. 1424 Sec. 13147b)"

Section 483.025, RSMo 1949 which is included in the provisions applicable to all clerks of courts of record provides as follows:

"Every clerk, before he enters on the duties of his office, shall enter into bond, payable to the state of Missouri, with good and sufficient securities, who shall be residents of the county for which the clerk is appointed or elected, in any sum not less than five thousand dollars, except as otherwise provided by law, the amount to be fixed and the bond to be approved by the court of which he is clerk, or by a majority of the judges of such court, in vacation. * * * *."

Section 59.100, RSMo 1949 which is applicable to clerks of the circuit court who are ex officio recorders provides as follows:

"Every clerk, before entering upon the duties of his office as recorder, shall enter into bond to the state, in a sum not less than one thousand dollars nor more than five thousand dollars at the discretion of the county court, with sufficient sureties, to be approved by said court, conditioned for the faithful performance of the duties enjoined on him by law as recorder, and for the delivering up of the records, books, papers, writings, seals, furniture and apparatus belonging to the office, whole, safe and undefaced, to his successor. (13150)"

As provided above the circuit clerk and ex officio recorder must provide a bond conditioned upon the faithful performance of his duties as circuit clerk and also a bond conditioned upon the faithful performance of his duties as ex officio recorder. It would seem that since two distinct

Mr. William L. Hunga

statutes have been enacted requiring a bond for the faithful performance of the duties of each office, one bond could not be prepared to cover the required bond for each office. The approval of the bond conditioned upon the faithful performance of the duties of the office of circuit clerk must be approved by the court of which he is clerk, whereas the bond required of him as ex officio recorder is to be approved by the county court. In view of this it must be concluded that it was the intent of the legislature that two separate and distinct bonds were required.

This question has never been presented to the courts of this state. However, it has been ruled upon by the Supreme Court of California in the case of People v. Ross, 28 Cal. 76. In this case the statute enacting and organizing the county of Kern provided that the sheriff of the county shall also be ex officio tax collector. The court stated at l.c. 77, 78, that:

"The offices of Sheriff and Tax Collector of Kern County, though held by the same person, are, nevertheless, separate and distinct offices. (Lathrop v. Brittain, 30 Cal. 680.) In the absence of any statute expressly providing that one official bond only shall be required of a person who holds both offices, and that such bond shall be for the faithful performance of the duties of both offices, a separate bond for each office is as much required as if they were held by different persons. (People v. Love, 25 Cal. 520.)"

"* * * * * As was said in the case of the People v. Edwards, the offices are not so blended that the bond executed for the faithful performance of the duties appertaining to the one would embrace, in the absence of a statute to that effect, the obligations belonging to the other. * *

* * *

Therefore it is our opinion that since the duties of the officer in question as circuit clerk are separate and distinct

Mr. William L. Hungate

from his duties as ex officio recorder and since the bond required of him as circuit clerk is provided for by a statute entirely separate and distinct from that statute requiring his bond as ex officio recorder and since the bond required as circuit clerk must be approved by the circuit court while the bond required as ex officio recorder must be approved by the county court, two separate and distinct bonds were contemplated and provided for by the legislature. Therefore no one bond could be given covering both offices as statutory authority therefor cannot be found.


CONCLUSION

It is therefore the opinion of this department that in counties of the fourth class, the circuit clerk and ex officio recorder must give two separate and distinct bonds, one conditioned upon the faithful performance of his duties as circuit clerk and another conditioned upon the faithful performance of his duties as ex officio recorder.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED

 J. E. TAYLOR
Attorney General

RHV:ba

OFFICERS: Recorder of deeds: Recorder of deeds can refuse
Fees and Salaries: Recording instrument until
recording fee is paid.

*See opinion Feb 2, 1959 to
James H. Anderson*
February 2, 1951

Honorable William L. Hungate
Prosecuting Attorney
Lincoln County
Troy, Missouri

2-19-51
FILED

43

Dear Sir:

Your letter at hand requesting an opinion of this department, which, in part, reads:

"Frequently our Recorder of Deeds receives thru the mail instruments to be recorded. Sometimes the sender does not enclose the necessary fee to pay for filing or recording. In prior years our Recorder accepted such instruments and filed or recorded them, then at the end of each month the Recorder was required to remit to the County his fees on all filed or recorded instruments. Frequently such fees had not yet been received by him and he found there were many he never collected.

"Now our Recorder would like to know if he can refuse to file or record an instrument unless, or until he first receives his fee. Of course the thing that worries him is that he might receive through the mail a Deed of Trust with no accompanying fee, and in accord with what he deems good business practice, refuses to file or record it until he receives his fee, and so writes the sender. Then suppose someone comes in with a Deed of Trust on the same piece of property and pays their fee and he records for them. Does the second Deed of Trust have priority over the first? Is the Recorder liable for not having recorded the first?"

Honorable William L. Hungate

The principal question which you have asked is whether or not the recorder of deeds in your county can refuse to file or record an instrument unless or until he receives the proper fee for filing and recording same. In this connection your attention is directed to Section 59.320, R.S. Mo. 1949, which reads as follows:

"The recorder shall not be bound to make any record for which a fee may be allowed by law, unless such fee shall have been paid or tendered by the party requiring the record to be made."

We believe that the above statute is clear in its language and definite in its meaning, and as we interpret it the recorder of deeds is not required to record an instrument until the fee for recording the same is first paid or tendered by the party presenting the instrument.

In view of the above-quoted statute, and our interpretation of same, it is our further thought that there would be no liability on the recorder of deeds should the situation arise as you have set out in your letter. However, as a suggestion, it might be well for the recorder of deeds, in writing a person who has sent by mail an instrument to be recorded without enclosing the fee, to cite the above statute when he refuses to record the instrument.

CONCLUSION

It is therefore the opinion of this department that a recorder of deeds may refuse to file or record an instrument presented to him until the proper fee for recording same has been paid or tendered.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

PUBLIC HEALTH AND WELFARE: Director of Department of Public
STATE HIGHWAY DEPARTMENT: Health and Welfare may convey land
of said department to State Highway
Department for right-of-way purposes.

April 12, 1951

4-12-51

Honorable W. Ed. Jameson
Director
Department of Public Health and Welfare
State Office Building
Jefferson City, Missouri



Dear Mr. Jameson:

Your recent letter requesting an official opinion of
this department reads as follows:

"I am enclosing a letter which I have
received from the State Highway Depart-
ment in regard to the conveyance of a
tract of land in Buchanan County to that
Department for right-of-way.

"Is it your opinion that I have the
authority to convey this right-of-way
without the specific authorization of
the Legislature by virtue of the general
authorization given in Section 227.130,
R. S. Mo., 1949."

Section 191.120, RSMo 1949, provides:

"Title to all state property, real and
personal, assigned to, or held, occupied
and controlled by the department of public
health and welfare, and the various divi-
sions thereof, in the performance and ad-
ministration of its or their various powers
and functions hereunder, shall vest suc-
cessively in each incumbent director of
public health and welfare, as trustee, for
and on behalf of the state of Missouri."

We assume that the tract of land lying in Buchanan County
to which you refer in your request is held, occupied and con-
trolled by the Department of Public Health and Welfare or one

Honorable W. Ed. Jameson

of the various divisions thereof, and that title thereto is vested in you, Director of the Department of Public Health and Welfare, as trustee for and on behalf of the State of Missouri. This tract of land is now sought by the State Highway Department for a right-of-way.

Section 227.130, RSMo 1949, provides:

"The state of Missouri, and all departments, boards, commissions, bureaus, institutions, public agencies and political subdivisions thereof, holding title to or having administrative jurisdiction and control of real estate or other property, are hereby authorized and empowered to give, grant and convey to or for the use of the state highway commission of Missouri such right of ways or other easements and appurtenances in said real estate or property as may be necessary for the proper and economical construction or maintenance of state highways."

Title to the tract of land in question is vested in you as Director of the Department of Public Health and Welfare. Section 227.130, supra, authorizes the Department to give, grant and convey to or for the use of the state highway commission of Missouri such right of ways or other easements and appurtenances in this tract of land as may be necessary for the proper and economical construction or maintenance of state highways. It is, therefore, our opinion that specific authorization by the Legislature is not necessary to authorize the conveyance under discussion as the general authorization given in Section 227.130, supra, is sufficient.

CONCLUSION

It is, therefore, the opinion of this department that the Director of the Department of Public Health and Welfare is authorized by Section 227.130, RSMo 1949, to give, grant and convey to the State Highway Commission of Missouri such


Honorable W. Ed. Jameson

right of ways or other easements and appurtenances in land of the Department of Public Health and Welfare or one of the various divisions thereof, as may be necessary for the proper and economical construction or maintenance of state highways, title to which land is held by said Director as trustee, for and on behalf of the State of Missouri. No specific authorization by the Legislature for such transfer is necessary.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RHV:VLM

COUNTY ASSESSOR: County Clerk may permit assessor to hire
COUNTY CLERK: stenographic help in fourth class county;
ASSESSOR: County Court not authorized to pay compensation
for deputy assessor or clerical hire. County
Clerk not authorized to alter assessor's books
on his own initiative when assessor certifies
his books to the county court.

January 22, 1951

7/9/51

Honorable John A. Johnson
Prosecuting Attorney for Reynolds County
Centerville, Missouri



Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"I have been requested by the Assessor of Reynolds County, Missouri to find out whether the Assessor in Counties of the 4th Class is entitled to have his Clerk Hire or any portion thereof, paid for by the County Court from County Funds?

"Also he would like to know whether the County Clerks of 4th Class Counties have the authority to change any or all of the totals of the Real and Personal Tax Books, certified to him by the County Assessor."

This department, in an opinion rendered to Mr. J. W. Thurman, Prosecuting Attorney of Jefferson County, dated April 29, 1949, held that county courts in counties of the third class may in their discretion reimburse a county assessor for necessary stenographic hire. That opinion related only to stenographers and did not pass upon the question of the pay of clerks or deputies. Since the same reasoning and conclusion would be applicable to counties of the fourth class we enclose a copy of that opinion for your information. Based on the reasoning therein it is the opinion of this department that a county court in counties of the fourth class, may, in their discretion, reimburse a county assessor for necessary stenographic hire.

Mr. John A. Johnson

Distinguish therefrom the compensation of a deputy assessor or clerk which the county court of a fourth class county is not authorized to pay.

The question presented, as phrased by you, whether or not the assessor in counties of the fourth class is entitled to have his clerk hire or any portion thereof, paid for by the county court from county funds.

R. S. Mo., 1949, Section 53.060 provides for the appointment of deputies, and for their pay in the following words:

"Every assessor, except in the city of St. Louis, may appoint as many deputies as he may need, to be paid as provided by law. Each deputy shall take the same oath and have the same power and authority as the assessor himself. The assessor shall be responsible for the official acts of his deputies." (L. 1945 p. 1782, Sec. 5)"

While sections 53.140 to 53.180 inclusive, R. S. Mo., 1949, provide for compensation of the county assessors in counties of the fourth class, a review of these and other statutes relating to assessors in such counties discloses no provision for the pay of deputies or clerks.

It appears that while an assessor in a fourth class county may employ as many deputies as he may need, the county court may not pay for said deputies out of county funds, but said deputies must look to the assessor for their compensation.

For your information we are enclosing an opinion rendered by this department to Mr. James D. Clemens, Prosecuting Attorney for Pike County, dated February 4, 1950, holding that county courts of counties of the third class may not pay the compensation of a deputy assessor or clerk. The reasoning therein and conclusion reached is also applicable to a county of the fourth class.

Turning now to your second question as to whether the county clerk of a fourth class county has the authority to change any or all of the totals of the real and personal tax books, certified to him by the county assessor. Your attention is directed to R. S. Mo., 1949, Section 137.245 requiring the county assessor to certify to the county court a copy of the assessor's books and enjoins upon the county clerk the duty of making an abstract of the same and forward such abstract

Mr. John A. Johnson

to the state tax commission. Said section reads as follows:

"1. The assessor, except in St. Louis city, shall make out and return to the county court, on or before the thirty-first day of May in every year, a fair copy of the assessor's book, verified by his affidavit annexed thereto, in the following words, to wit:

....., being duly sworn, makes oath and says that he has made diligent efforts to ascertain all the taxable property being or situate, on the first day of January last past, in the county of which he is assessor; that, so far as he has been able to ascertain the same, it is correctly set forth in the foregoing book, in the manner and the value thereof stated therein, according to the mode required by law."

"2. The clerk of the county court shall immediately make out an abstract of the assessment book, showing aggregate footings of the different columns, so as to set forth the aggregate amounts of the different kinds of real and tangible personal property and the valuation thereof, and forward the same to the state tax commission. Upon failure to make out and forward such abstract to the state tax commission on or before the twentieth day of June, the clerk shall, upon conviction be deemed guilty of a misdemeanor. (L 1945, p 1782 Sec. 39)"

We are unable to find any statute authorizing the county clerk on his own initiative to alter the totals entered in the assessor's book and certified by him to the county court.

CONCLUSION

A County Court in counties of the fourth class may, in their discretion, reimburse a county assessor for necessary stenographic hire.

A County Court in counties of the fourth class is not authorized to pay the compensation of a deputy assessor or clerk.

Mr. John A. Johnson

The County Clerk in a county of the fourth class is not authorized, on his own initiative, to alter the totals of the Assessor's books certified by the assessor to the county court.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED

OK

J. E. TAYLOR
Attorney General

2 Encl.

JEM:ba

COUNTY BOARD OF EDUCATION) County board of education has no authority
EMPLOYMENT OF ATTORNEY) to employ attorney to advise board with
reference to preparation and submission to
voters of plan for reorganization of school
districts.

September 25, 1951

Honorable Elza Johnson
Assistant Prosecuting Attorney
Jasper County
415 South Main
Carthage, Missouri



Dear Sir:

We have your recent letter in which you request an opinion of this department. Your letter is as follows:

"I would like to have from your office an opinion on the following question:

"Is a County Board of Education, provided for by Sections 165.657 to 165.707 Revised Statutes of Missouri, 1949, authorized to employ attorneys to assist and advise the Board in reference to the preparation and submission to the voters of the plan for reorganization of school districts provided for by such Act, and may the attorneys' fee be considered as part of the cost of holding such election to be charged to each component district embraced in the proposed enlarged districts under the provisions of Section 165.680."

We have examined Sections 165.657 to 165.707, RSMo 1949, and fail to find any provision specifically granting to a county board of education organized under the provisions of Section 165.657 authority to employ an attorney or attorneys to advise it in connection with the preparation and submission to the voters of a plan for the reorganization of school districts. We are of the opinion, therefore, that unless there is some provision in the statute providing for such boards, from which provision such authority can be implied, such authority in fact does not exist. We suggest the fact that such boards are

Honorable Elza Johnson

created and assigned their functions by Sections 165.657 to 165.707, RSMo 1949, inclusive, and must necessarily derive their authority from the provisions of said sections. The only provision relative to expense involved in an election called by the board is embodied in Section 165.680, RSMo 1949, and is as follows:

"* * *Each judge and each clerk shall receive compensation of five dollars per day. The county board of education shall supply ballots, polling books and all other materials required in the election. The cost of election supplies and the compensation of election officials shall be charged to each component district embraced in the proposed enlarged district in proportion to the total assessed valuation and shall be paid from the incidental fund. * * *"

We suggest the fact that the above quoted statute specifically mentions certain expenses connected with the election and provides for their payment by the component school districts embraced in the proposed enlarged school district but fails to mention among these expenses the cost of having an attorney to advise the board in calling and conducting the election provided for by law. Since said section specifies certain expenses in connection with the election chargeable to component districts and fails to specify attorneys' fees, we are of the opinion that said section cannot be relied upon as authority for hiring an attorney and charging the component districts with the attorney's fee.

The only other section to be construed in answering your question is Section 165.670, RSMo 1949, which provides as follows:

"Each member of the board shall be reimbursed for the actual expense incurred in the performance of duties as a member of the board. All such expenses shall be itemized and approved by the president of the board and certified by the secretary to the state comptroller. Said reimbursement shall be paid from the state school moneys fund."

While it is true that this department has heretofore expressed its opinion to the effect that under a given set of circumstances a county board of education might employ an attorney and compensate him from the State School Moneys Fund under the authority of the last above quoted section the facts upon which that opinion was based involved litigation for the purpose of collecting from one of

Hon. Elza Johnson

the component school districts its proportionate share of the expense of an election called by the county board and it was our view that under these circumstances since it was the duty of the board to conduct the election and since the expenses thereof were to be borne by the component school districts in accordance with the provisions of Section 165.680, supra, and since it was impossible to collect the proportionate share of the expense of the election from one of the component districts without a suit which rendered necessary the services of an attorney, the authority to employ the attorney might be implied, we do not believe, however, that the reasoning of the aforesaid opinion applies to the facts involved in your inquiry or that the last-above quoted section warrants the employment of an attorney by the County Board of Education for the purpose of advising the Board with reference to the election.


CONCLUSION

We are accordingly of the opinion that a county board of education has no authority to employ an attorney to advise it with reference to the preparation and submission to the voters of the plan of reorganization.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

SMW:mw

COUNTY COURTS: The county court may in its discretion allow or deny
TOWNSHIP ORGANI- petition for incorporation of special road district.
ZATION: County court's exercise of discretion is exercise
SPECIAL ROAD of legislative instead of judicial power. Not
DISTRICTS: necessary to divide entire county into special road
districts. Special road district entitled to
receive only those tools and machinery regularly
used heretofore in maintaining roads now in the
district.

July 17, 1951



7-18-51

Mr. Don Kennedy
Attorney at Law
Nevada, Missouri

Dear Sir:

We have before us your letter of May 24, 1951, which has been assigned the writer for an opinion. Your request contains four separate questions and the pertinent parts are as follows:

"This procedure is prescribed by Section 233.320, R.S. Mo. 1949 et seq. So far as I am able to determine, the petition is in due form and has been signed by the requisite number of resident land owners, and will come up for hearing in the August term of the Vernon County court. This has never been attempted in Vernon County before, to my knowledge. I have this question, under Section 233.325, R.S. Mo. 1949, as to the power of the county court: first, whether the court could, at its discretion, deny the petition altogether, even though it might be in proper form and signed by the requisite number of land owners?

"I anticipate that remonstrances will be filed by other owners of land within the proposed district who reside within the district. The reasons for the remonstrances will probably be that it would be impractical to divide what is now Clear Creek township into two separate units for road administration; that if the township is divided into two units, neither unit will be able financially to maintain sufficient equipment for the maintenance of roads; and that there is no logical geographical reason for such division.

"Some parts of the cited statute indicate to me that, upon presentation to it of a petition in form complying with the statute, signed by the

Hon. Don Kennedy

requisite number of resident land owners, of which proper notice has been given in the prescribed manner, the court's only discretion is to make any change in the boundaries of such proposed district as the public good may require and make necessary, and after making such changes, the court must make an order incorporating the road district.

"Other parts of the same statute indicate that the court might, in its discretion, sustain the remonstrances and refuse to incorporate the road district.

"There is another question that occurs to me. If the court has the power to refuse to incorporate the district, as prayed, or to grant it in its discretion, would such power be judicial, thereby rendering Section 233.325, R.S. Mo. 1949, unconstitutional under Article 5, Section 1 of the 1945 Constitution of Missouri?

"Under Section 233.320, must the entire county be divided into special road districts, in order for any special road district to be incorporated? Assuming that the court does incorporate this special road district, how is the road machinery and equipment to be divided between the commissioners of the road district and the board of trustees of Clear Creek township?

"Section 233.340, R.S. Mo. 1949, apparently contemplates that the road district shall include all of one or more townships, for it provides in Paragraph 1 that the township board shall cause all tools and machinery used for working roads belonging to the districts formerly existing, and composed of territory impressed within the incorporated district, to be delivered to said commissioners. It seems unfair to me to follow that statute to the letter in this case, but I am unable to find any other statute prescribing how the tools and machinery should be divided in a case of this kind."

Section 233.325, RSMo 1949, provides as follows:

"Whenever a petition, signed by the owners of a majority of the acres of land owned by residents of the county residing within

Hon. Don Kennedy

the district proposed to be organized, and setting forth the proposed name of the district, and giving the boundaries thereof and the number of acres owned by each signer and the names of other owners of land residing within such boundaries so far as known, and the number of acres owned by each so far as known, and praying for the organization of a special road district in accordance with sections 233.320 to 233.445, shall be filed in the office of the clerk of the county court thirty days before the beginning of the next regular term of said court, the said clerk shall give notice by at least three publications in some weekly newspaper printed in the county, or by at least five handbills put up at public places within the district, of the presentation of said petition, and of the date of the beginning of the next regular term of the county court at which the same may be heard. Said notices shall contain the names of at least three signers of said petition and set out the boundaries of said proposed district, and shall notify all resident owners of land in said proposed district, who may desire to oppose the formation thereof to appear on the first day of such regular term of court and file their written remonstrance thereto.

"2. All resident landowners owning land within the proposed district may join in one remonstrance, or each such owner may file his separate remonstrance, and each remonstrance shall be in writing and shall state specifically and separately the objection or objections of the remonstrators to the formation of such proposed road district, and shall be filed in said court with the clerk thereof on or before the first day of said regular term.

"3. On the first day of said term of court, or as soon thereafter as its business will permit, the court shall hear such petition and remonstrance, and may make any change in the boundaries of such proposed district as the public good may require and make necessary, and if after such changes are made it shall appear to the court that such petition is signed or in writing consented to by the owners of a majority of all the acres of land owned by residents of the county residing

Hon. Don Kennedy

within the district as so changed, the court shall make an order incorporating such public road district, and such order shall set out the boundaries of such district as established.

"4. If no remonstrance shall have been filed, or all remonstrances filed are overruled by the court, the court shall determine whether such petition has been signed by the owners of a majority of the acres of land owned by residents of the county residing within the district, and if so, shall make an order incorporating the district with the boundaries given in the petition, or such boundaries as may be set forth in an amended petition signed by the owners of a majority of the acres of land owned by residents of the county residing within the district, affected thereby; and such amended petition may be filed at any time before the making of the order establishing a road district, but the boundaries proposed for the district shall not be so changed as to embrace any land not included in the notice given by the clerk unless the owner thereof shall in writing consent thereto, or shall appear at the hearing, and is notified in open court of such fact and given an opportunity to file or join in a remonstrance.

"5. Whenever an order is so made incorporating a public road district, such district shall thereupon become, by the name mentioned in such order, a political subdivision of the state for governmental purposes with all the powers mentioned in this section and such others as may be conferred by law." (Underscoring ours.)

Under the above sections when a petition is filed requesting the organization of a special road district, if no remonstrances are filed in opposition thereto, the only duty the county court has is to determine whether the petition has been signed by the owners of a majority of the acres of land within the boundaries of the district set forth in the petition. If the court determines that the petition has been signed by the owners of a majority of the acres of land, then it has the absolute duty to issue an order incorporating the road district.

Hon. Don Kennedy

However, if remonstrances are filed, then it becomes the duty of the county court to determine if the "public good may require and make necessary" any changes in the boundaries proposed in the petition. The purpose of this determination is set forth in State ex inf. Killam v. Colbert, 273 Mo. 198, 201 S.W. 52, as follows:

"Language could not plainer state that in organizing the district the court must determine, after notice and opportunity to landowners to be heard, whether or not lands located within its proposed boundaries would be benefited. * * * In the very nature of a case, when a district is formed it is formed for the purpose of constructing some contemplated road or roads, and in such case the county court probably has information as to the location and extent of the road or roads in contemplation when the petition is presented, otherwise how could it determine that the public good required the formation of the district? * * *

If the court determines that certain lands in the proposed district would not be benefited by the roads contemplated to be built in the district, then the county court, under the statute, may "change" the boundaries and exclude said lands from the district. It will be noted the statute provides that the county court may only "change" the boundaries, which would appear not to contemplate a finding that none of the lands in the proposed district would be benefited. However, in the Colbert case, supra, it is stated that "it must be decided by the county court that all the land in the district would be benefited by the formation of a district in an amount approximating the probable burdens." Therefore, it would appear that the county court could, after excluding from the proposed district such lands that would not be benefited, come to the conclusion that such lands which remain would not be benefited in the amount approximating the probable burdens. This is a matter which is left by the Legislature entirely to the discretion of the county court.

It is difficult for this office to decide the outcome in every case, and we must content ourselves with giving the rules as laid down by our Supreme Court. Therefore, in answer to your first question it is our view that the county court may determine that none of the property within the proposed district would be benefited by the roads proposed to be built within said district. But, in absence of such absolute determination, the only authority the county court has is to exclude from the proposed district such

Hon. Don Kennedy

land that would not be benefited and the remaining part should be incorporated as a road district if the petition shows that the signers of the petition own a majority of the land in said changed district.

Under Section 233.325, supra, the county court exercising its discretion in refusing to incorporate the district as prayed would not be an exercise by it of judicial power rendering this section unconstitutional under Article 5, Section 1, Constitution of Missouri, 1945. The county court's action in denying the petition altogether or sustaining it in whole or in part is merely an exercise of administrative discretion which is proper under Article 6, Section 7, of the 1945 Constitution giving the county court exclusive authority to transact all county business. Our Supreme Court in the State ex inf. Attorney General vs. Hughesville Special Road District et al., 6 S.W.(2d) 594, 319 Mo. 1246, l.e. 1252, the court said:

"The proceedings had for the incorporation of the special road district constituted, in their totality, an exercise of legislative and not judicial power. No due-process-of-law requirements were therefore involved. Notice of the filing of the petition in the county court would not have been necessary had the statute not required it. (In re City of Uniondale, 285 Mo. 143, 225 S.W. 985.) The purpose intended to be subserved by the notice, as the statute points out, was to notify all owners of land in the proposed district who might desire to oppose the formation thereof. It was clearly sufficient for that purpose."

Now we arrive at the third question. Section 233.320, R.S. Mo. 1949, provides as follows:

"1. In counties now operating or which may hereafter operate under township organization, whenever it is proposed to form a special road district within the limits of one or more incorporated townships, such proposed district shall be organized in the manner herein prescribed."

Hon. Don Kennedy

"2. The county court shall divide the territory within their respective counties into road districts in the manner herein prescribed, and every such district organized according to the provisions of sections 233.320 to 233.445 shall be a body corporate and possess the usual powers of a public corporation for public purposes, and shall be known and styled ' special road district of
 county,' and in that name shall be capable of suing and being sued, of holding such real estate and personal property as may at any time be either donated to or purchased by it in accordance with the provisions of sections 233.320 to 233.445, or of which it may be rightfully possessed at the time of the passage of sections 233.320 to 233.445, and of contracting and of being contracted with as herein provided.

"3. Districts so organized may be of any dimensions that may be deemed necessary or advisable, except that every district shall be included wholly within the county organizing it and shall contain at least six hundred and forty acres of contiguous territory; provided, that the county court shall not have power to divide the territory within the corporate limits of a city having a population of one hundred and fifty thousand into such road district."
(Underscoring ours.)

Our interpretation of the parts of the above statute, as underscored, merely indicate to us that special road districts proposed to be formed must be organized in the manner prescribed herein; the manner in which the county court shall divide the territory within their respective counties into proposed road districts; that the proposed special road district or districts may each be formed within the limits of one or more townships, be of any dimension except it must be wholly within the county organizing it and contain at least 640 acres of contiguous territory but that the county court shall not have the power to divide territory lying within the limits of a city of 150,000 population into such road district. We are unable to interpret from its terms that the statute makes it mandatory that the entire county be divided into special road districts.

Next, we take up your fourth question. Section 233.340, R.S. Mo. 1949, provides as follows:

Hon. Don Kennedy

"1. The township board of trustees shall, upon the organization of such commissioners, cause all tools and machinery used for working roads belonging to the districts and parts of districts formerly existing and composed of territory embraced within the incorporated district to be delivered to said commissioners, for which such commissioners shall give receipt, and such commissioners shall keep and use such tools and machinery for constructing and improving public roads and bridges.

"2. The township boards shall also cause the township treasurer to pay over to the treasurer of the special road district all moneys in his hands belonging to the district or districts that have been merged into the special road district whenever the board of commissioners of such special road district shall make demand therefor.

"3. Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts, within the district to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work; provided, that said commissioners may have such road work, or bridge or culvert work, or any part thereof, done by contract, under such regulations as said commissioners may prescribe."

We interpret paragraph 1 of the above statute to say: that the special district, carved out of the township territory, is entitled to only that part of the township's machinery and tools as was regularly used in the construction and maintenance of the roads now embraced within the limits of the special road district, and no more.

CONCLUSION

It is the opinion of this department that under Section 233.325,

Hon. Don Kennedy

supra, the county court can in its discretion deny the petition altogether even though petition is in proper form and contains the requisite number of signatures if remonstrances are filed; that the county court's exercise of discretion in granting or refusing to grant incorporation of the district is an exercise of administrative discretion as it is the exercise of legislative and not judicial power; it is not necessary under Section 233.32, supra, that the entire county be divided into special road districts; the special road district is entitled to only so much of the machinery and tools of the township as was formerly used in working the roads now embraced within the special road district.

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ABE:mw

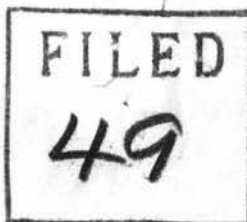
PROSECUTING ATTORNEYS:
FEES:
CHANGE OF VENUE:

Prosecuting attorney of county from
which change of venue is taken should
be remitted conviction fee.

January 4, 1951

1-12-51

Hon. Robert G. Kirkland
Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Mr. Kirkland:

Your recent letter requesting an official opinion of this
department reads in part as follows:

"Upon complaint filed in the Magistrate Court of
Clay County, the defendant was arraigned and
preliminary hearing held on a felony charge. The
defendant was bound over to the Clay County Circuit
Court for trial, after which transcript and informa-
tion of the prosecuting attorney of Clay County was
filed in the Clay County Circuit Court charging the
defendant with a felony. Subsequent to that date
but prior to the date of trial, the defendant caused
the case to be removed to another county for trial
on change of venue. Upon trial in the county to
which the change was taken, the defendant was con-
victed of a felony as charged; subsequently the court
costs in the case were paid. Should the prosecuting
attorney's conviction fee be remitted by the circuit
clerk to the prosecuting attorney in the county where
the case was tried and the defendant convicted or to
the prosecuting attorney of Clay County who filed the
original information?"

The question therefore is whether upon conviction in a case
tried upon change of venue, the conviction fee shall be
remitted to the prosecuting attorney of the county in which
the information was filed or to the prosecuting attorney of
the county in which the defendant was tried and convicted.

Hon. Robert G. Kirkland

Section 13405, R. S. Mo. 1939, provides for conviction fees as follows:

"Prosecuting attorneys shall be allowed fees as follows, unless in cases where it is otherwise directed by law: * * *

* * * * *

for the conviction of every defendant in the circuit court, upon indictment or information, or before a justice of the peace, upon information, when the punishment assessed by the court or jury or justice shall be fine or imprisonment in the county jail, or by both such fine and imprisonment, five dollars; for the conviction of every defendant in any case where the punishment assessed shall be by confinement in the penitentiary, except in cases of rape, arson, burglary, robbery, forgery or counterfeiting, ten dollars; for the conviction of every defendant of homicide, other than capital, or for offenses excepted in the last clause, twelve dollars and fifty cents; for the conviction of every defendant in a capital case, twenty-five dollars; * * * * *"

Among the duties of a prosecuting attorney provided for by Section 12942, R. S. Mo. 1939, is the following:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, * * * and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. * * * * *"

In view of the above statutes we are of the opinion that since the prosecuting attorney of the county in which the information is filed and from which a change of venue is taken has the duty to follow and prosecute the cause, the conviction fee provided for by Section 13405, supra, should be remitted to such prosecuting attorney.

Hon. Robert G. Kirkland


CONCLUSION

It is therefore the opinion of this department that the prosecuting attorney of the county in which the information is filed in a criminal cause and from which a change of venue is taken should, upon conviction, be remitted the conviction fee provided for by Section 13405, R. S. Mo. 1939.

Respectfully submitted

RICHARD H. VOSS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
ATTORNEY GENERAL

RHV:A:ba

PUBLIC FUNDS:

A custodian of public funds is liable
as an insurer for any loss thereof.

January 30, 1951

1-31-51

FILED

49

Mr. John C. Kibbe
Prosecuting Attorney
Moniteau County
California, Missouri

Dear Mr. Kibbe:

We are in receipt of your recent request for an official
opinion, which request is as follows:

"On the request of the Presiding Judge of
the County Court, I am requesting your office
for an advisory opinion based on the following
set of facts:

"1. On January 9th, 1951, the office of the
County Collector was broken into, and over
\$200.00 was stolen. The criminal or criminals
have never been apprehended.

"2. The front door of the building was forced,
as was the door to the Collector's office. Both
had been locked. The safe was forced open. It
too had been locked. The safe was furnished to
the Collector by the County Court, and had a
rating as being fireproof, but none as to being
burglar-proof.

"3. The bank here in California closes at
3 P.M., and most of the money which was stolen
probably could have been banked. It has been
the practice of the Collectors here, however,
to rely on the safe furnished by the County.

Mr. John C. Kibbe

"Who is to bear the loss, the Collector individually, the sureties on his bond, or the County?"

The question here to be determined concerns the extent of liability imposed upon a custodian of public funds. The Supreme Court of Missouri in 1878 handed down a ruling on this point in the case of State ex rel. v. Powell, 67 Mo. 395. In the course of that opinion the court said:

"Public officers, however, are universally held to a more rigorous accountability than simple trustees for the public funds committed to their keeping; and though, in a general sense, they may be said to be bailees, still they are bailees who are subject to special obligations for the benefit of the public, and the degree of their responsibility is not to be determined by the ordinary law of bailment. In the United States v. Prescott, 3 How. 578, a leading case on this subject, it was pleaded to a suit on an official bond that the funds had been feloniously stolen, taken and carried away without any fault or negligence on the part of the officer, and the court, holding the plea insufficient, said: 'Public policy requires that every depositary of the public money should be held to a strict accountability; not only that he should exercise the highest degree of vigilance, but that "he should keep safely" the moneys which come to his hands. Any relaxation of this condition would open a door to frauds which might be practiced with impunity.'"

The Supreme Court in 1881 sustained this principle in State ex rel. v. Moore, 74 Mo. 413. The court held that the loss of county funds through the failure of a bank in which they were deposited would not relieve the treasurer from liability to account for them; and this was held to be true notwithstanding the treasurer, before placing said funds in said bank, assured himself by strict inquiry that the institution was safe and solvent.

The Kansas City Court of Appeals in 1927 upheld this doctrine in Fayette v. Silvey, 290 S. W. 1019. In the course of that opinion the court said:

Mr. John C. Kibbe

"The general rule, which is the rule in this state, is that one of the duties of a public officer intrusted with public money is to keep such funds safely, and that duty must be performed at the peril of such officer. Thus, in effect, he is an insurer of public funds lawfully in his possession. Shelton v. State, 53 Ind. 331, 21 Am. Rep. 197; Thomssen v. County, 63 Neb. 777, 89 N. W. 389, 57 L.R.A. 303. He is therefore liable for losses which occur even without his fault."

It is the law that a public official intrusted with the custody of public funds is under strict accountability and must safely keep and pay over all such funds according to law. He takes the position of an insurer and must account for all moneys received by him. He must make good all losses, and this holds true when losses occur through no fault of his. His liability is not qualified by caution or good conduct in office.

The sureties on the bond of a county collector undertake to guarantee "that he will faithfully and punctually collect and pay over all state, county and other revenue" for the full term of his office. Section 52. 020, RSMo 1949. Under this obligation the sureties are bound to the same extent as the collector is. They are liable for any loss of public funds that may occur during the period covered by the bond.

CONCLUSION

It is the opinion of this department that in the case now under consideration the Collector of Moniteau County is liable and should bear the total loss of moneys stolen from his office on January 9, 1951. If for any reason he should default, the sureties on his bond could be held to make good the loss.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SCHOOLS: Reorganization plan submitted by Greene County Board of Education and approved by the State Board of Education to combine Ritter and Springfield School Districts is valid.

February 1, 1951

Honorable Milton B. Kirby
Prosecuting Attorney
Greene County
Springfield, Missouri



2-26-51

Dear Mr. Kirby:

This will acknowledge receipt of your request for an official opinion which reads:

"A controversy has arisen in regard to the disposition of school funds of Ritter School District No. 62, in Greene County, Missouri. The facts leading up to the controversy are as follows:

"In November, 1949, the Greene County Board of Education placed Ritter School and other rural school districts in a proposed elementary district, which proposed reorganization was defeated at a duly called election.

"On October 18, 1950, the following petition, signed by thirteen residents of the Ritter School District, was received by the Ritter School Board and which petition is set out verbatim below:

"We, the undersigned qualified voters of Ritter School District No. 62, hereby petition the School Board to call a special election for the purpose of determining the vote on annexing our school (Ritter 62) with Willard School!

"On October 19, 1950, the Ritter School Board received a petition of more than ten residents of the Ritter School District, which petition requested annexation to the adjacent Springfield School District and which petition was filed on Section 10484, R. S. of Missouri, 1939, as amended. Up to this time the Ritter School Board has taken no action of any kind on this latter petition.

Honorable Milton B. Kirby

"On October 20, 1950, the Greene County Board of Education approved another reorganization plan which proposed to combine the Springfield School District and the Ritter School District into a reorganized district under Laws of Missouri, 1947, Vol. II, page 370; which plan was forwarded to the State Board of Education on October 23, 1950, and which plan was approved by the State Board of Education on December 15, 1950.

"On October 21, 1950, the Ritter School Board called an election by posting notices, a copy of such notice being set out verbatim below:

"Notice is hereby given to the qualified voters of Ritter School District No. 62, County of Greene, State of Missouri, that in conformity with the petition of thirteen resident voters of said district, a special school meeting will be held at Ritter School House in said district on the 6th day of November, 1950, commencing at 8:00 P.M. for the following purposes: To determine by vote the desire of the qualified voters of the Ritter School District in regard to annexing the Ritter School District No. 62 with the Willard District.

"By Order of the Board, this 21st day of October, 1950.

"Len V. McGinnis
M. J. Lefors
C. H. Grace
John D. Schaeffer, District Clerk."

"Such election was held on November 6, 1950, as scheduled, and a majority of votes cast favored annexation to the Willard School District. Before that date, however, on November 2, 1950, a declaratory judgment suit was filed in the Circuit Court of Greene County by certain residents of the Ritter School District who opposed annexation to the Willard District, in which suit they prayed the court to declare the petition filed on October 18, 1950, to be held invalid and that the notices of said election posted, on October 21, 1950, be held invalid, alleging that both the petition and notices were insufficient in law and

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alleging the further ground that the Ritter School District, at the time the petition was signed and filed and at the time the election was ordered, was not adjacent to the Willard School District since the Schuyler School District lay between the Willard District and Ritter District at such time, as shown by a school district map which is mailed to you under separate cover in connection herewith. The above named suit for declaratory judgment is still pending in the Greene County Court; no final action being taken thereon.

"The Schuyler School District Board ordered an election to be held on November 2, 1950, at which election a majority of the votes cast in said Schuyler election favored annexation to the Willard School District and on November 3, 1950, the Willard Board of Education accepted the annexation of Schuyler School District to the Willard School District.

"On December 18, 1950, the Ritter School Board accepted another petition asking for another election for the annexation to the Willard School District because of the legal attack which had been made against the election of November 6, 1950, and notices were posted this same day for an election to be held January 4, 1951. This election ordered on December 18, 1950, was held on January 4, 1951, at which time a majority of the votes cast favored annexation to the Willard School District, which it now adjoined because of the annexation of the Schuyler District to the Willard School District.

"On December 18, 1950, the same day that the Ritter School Board ordered the second election, the Greene County Board of Education at a meeting, ordered an election to be held on January 16, 1951, for the purpose of voting on the proposition of whether or not the Ritter School District should be annexed to the Springfield School District, and notices for the election to be held on January 16, 1951, were properly posted prior to December 28, 1950.

"The election ordered on January 16, 1951, was held as scheduled and a majority of votes

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avored the annexation of Ritter School District to the Springfield School District.

"There is no question raised as to the validity or sufficiency of any of the petitions or notices in any of the above elections except the one ordered by the Ritter School Board on October 21, 1950, and held on November 6, 1950.

"The Willard School Board accepted the annexation of the Ritter School District on January 9, 1951, on the basis of both elections; that is, the one held on November 6, 1950, and the one held on January 4, 1951. This was the first and only action taken by the Willard Board for the annexation of the Ritter School District.

"The County Treasurer of Greene County received the following warrants which have been paid from the Ritter School funds:

"January 8, 1951

\$ 1045.00 Willard Consolidated School,
which represents tuition for 12
students of the Ritter School
District.

347.20 Beckley Cardy Company, for books.
1050.00 Mrs. Mary Lantz, teacher's salary
to July 31, 1951.

"The following questions are submitted:

"(1) Was the election held on November 6, 1950, a valid election within the meaning of 10484, as amended?

"(2) If the November 6, 1950, election was invalid, then is the January 4, 1951, election valid in view of the pending proposal of the Greene County Board of Education and in view of the fact that a petition to annex to the Springfield District was then filed with the Ritter School Board, which board had taken no action on such petition?

"(3) Which district is entitled to the school funds held by the County Treasurer's office for the Ritter School District?

Honorable Milton B. Kirby

"(4) Are the warrants named above valid warrants?"

We have quoted your complete request for the reason it is rather complicated in view of the fact that there were so many petitions and elections held at very close intervals which are so conflicting, the purposes of which are to annex the several school districts in different ways.

We shall try to consider these elections and proposals for consolidation of the various school districts in the order stated in your request.

First, the petition filed by some 13 residents of Ritter School District on October 18, 1950, to call an election for the purpose of annexing said school district with the Willard School District must be declared void for the reason the very act under which authority is given to file such petition, namely, Section 165.300, RSMo 1949, specifically provides that whenever a certain school district which adjoins another school district desires to be attached thereto, they may do so by following a certain procedure and continues by setting forth the precise steps to follow. Said section reads in part:

"1. Whenever an entire school district, or a part of a district, whether in either case it be a common school district, or a city, town or consolidated school district, which adjoins any city, town, consolidated or village school district, including districts in cities of seventy-five thousand to five hundred thousand inhabitants, desires to be attached thereto for school purposes, upon the reception of a petition setting forth such fact and signed by ten qualified voters of such district, the board of directors thereof shall order a special meeting or special election for said purpose by giving notice as required by section 165.200; provided, however, that after the holding of any such special election, no other such special election shall be called within a period of two years thereafter."

Therefore, it is quite apparent that one of the prerequisites in the annexation of said school districts under the foregoing statute is that the districts to be annexed must be adjoining.

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While the courts have held that certain requirements are mandatory in the organization of certain school districts and if not met, the consolidation will be declared void, they have also held that where infringement is not of a substantial nature and does not violate the purpose of the statute, the requirement is not mandatory in the sense that it will be declared void. See *State v. Pretended Consolidated School District No. 1*, 223 S.W. (2d) 484, 1.c. 490, 491 (12). The reason for this requirement in the statute that said district shall be adjoining is apparent and we think it is highly important that said prerequisite be fully complied with or said election must be declared void. It would not be logical or practical in many instances to attach school districts for school purposes that were not in close proximity with each other and to do so would certainly violate the purpose of the statute.

Our examination of the decisions defining "adjoining" discloses that it means attached to or contiguous to each other.

In *Bullock v. Cooley*, 171 N.Y.S. 105, 106, 183 App. Div. 529, in construing an education law authorizing the school commissioner to dissolve and merge adjoining school districts, it was held that it did not authorize him to dissolve the district and annex it to one from which it is separated by more than one-half mile of water and hence not adjoining, and further held that adjoining means "touching or being contiguous."

In *Glen v. Wagner*, 90 P. (2d) 734, 736, 199 Wash. 160, the court held that plaintiffs and defendants were not adjoining proprietors where lots of plaintiffs and defendants did not touch each other, but were separated by a river.

Also in *Melder v. Great American Insurance Co.*, 9 So. (2d) 243, 244, the court held that a fire insurance policy on a dwelling house and additions thereto directly and immediately adjoining and communicating did not cover a garage building located about 18 feet from the house and entirely detached therefrom.

In *Rose v. Smiley*, 296 S.W. 815, 817, the court held that a city within a county, even if located on the edge of the county, does not adjoin the next county within Laws of Missouri, 1951, page 208, authorizing a county court of the county adjoining a city of 500,000 to establish sewer districts.

So, in view of Section 165.300, supra, and the foregoing

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decisions, we must conclude that the election held on the petition filed by the 13 residents of Ritter School District to call an election for the purpose of annexing Ritter and Willard School Districts is void for failure of the two districts to be adjoining at the time of the filing of said petition. The petitioners that filed the above petition must have arrived at the same conclusion or another similar petition would not have been filed on October 21, 1950, with the same purpose in mind to annex Ritter and Willard School Districts, since under Section 165.300, supra, it prohibits the holding of another election within a period of two years thereafter. So, apparently the petitioners also considered the first election void.

Thereafter, a petition was filed on October 19, 1950, by 10 residents of Ritter School District with the Ritter School Board for the purpose of calling an election to annex said district with the Springfield School District; however, no action has been taken on it since the filing of said petition. We can only assume that the reason for no action being taken is that the proponents who filed said petition are of the opinion that nothing further can be gained, that is to say, that the same result occurs if the reorganization plan approved on October 20, 1950, by the Greene County Board of Education to combine the Springfield School District and Ritter School District and which plan was approved by the State Board of Education on December 15, 1950, is valid and in full force and effect. At any rate, since no action has been taken since the filing of said petition, we are of the opinion the petitioners and the Ritter School District have abandoned it. In a very recent decision, *Mullins v. Eveland*, 234 S.W. (2d) 639, 1.c. 642, 643, the Kansas City Court of Appeals held that where a petition was filed to consolidate three common school districts with the superintendent of schools in June 1, 1947, and in December, 1948, no action had been taken thereon by the petitioners or the superintendent of schools, that it was abandoned; that the school laws contemplate prompt action and that no action having been taken over such a period would justify the conclusion that the three districts and superintendent of schools had abandoned the plan. While in the instant case the failure to take any action is not for such a long period, Section 165.300, supra, provides that the Board upon reception of said petition to annex the districts shall order a special meeting or special election for said purpose by giving notice, etc. This was not done in this instance, so as stated, we shall consider that plan for annexation as presented by the filing of a petition to annex Ritter School District with the Springfield School District as abandoned.

Honorable Milton B. Kirby

The next action taken was on October 20, 1950, when the Greene County Board of Education approved a plan of reorganization which combines the Springfield School District with the Ritter School District, which plan was approved by the State Board of Education on December 15, 1950. Thereafter, on December 18, 1950, the Greene County Board of Education ordered an election to be held on January 16, 1951, for the purpose of voting on a reorganization plan to combine Ritter and Springfield School Districts. A majority of votes cast at said election favored the plan. We are of the opinion that this procedure, so far as it has gone, followed the statute in every respect, namely, Sections 165.657, 165.673, 165.677 and 165.680, RSMo 1949. All that is now left to be done to complete the reorganization plan is to have an election for directors under Section 165.687, RSMo 1949, and transfer of records and funds under Section 165.690, RSMo 1949.

In view of the foregoing plan, we are of the opinion that it takes priority over all other petitions and actions taken referred to in your request for annexation or consolidation of said school districts as it is the first action fully acted upon to date in compliance with the statutes as to the presenting and approval of such plans.

In support of this conclusion, we cite State ex rel. Fry v. Lee, 314 Mo. 486, 1.c. 506, 507, wherein the court held that where a petition for formation of consolidated districts was filed with the county superintendent of schools and he followed the proper procedural statutes to complete the consolidation, that the superintendent of the county to whom notices and plats were presented and who refused to sign them, could not thwart the act of the superintendent who had initiated the movement by later posting notices and plats based upon a later petition for a consolidated school district. In so holding, the court said:

" * * * In matters calling for the exercise of a judicial function or duty by two or more tribunals of co-ordinate jurisdiction, it is a well-settled principle of law that the tribunal which first acquires jurisdiction of the subject-matter retains jurisdiction until the determination of the matter in controversy, and no tribunal of co-ordinate power will be permitted to interfere with, or thwart, its action. (15 C.J. 1134.) This rule or principle rests upon comity and is a reasonable and necessary one, because any other rule would lead to confusion and perpetual collision, and would be productive

Honorable Milton B. Kirby

of calamitous results and oftentimes a gross miscarriage of justice. The rule has been recognized and applied by this court, in Banc, in State ex rel. v. Reynolds, 209 Mo. 161, and State ex rel. v. Holtcamp, 266 Mo. 347.

"Under the admitted facts, as disclosed by the pleadings herein, the requisite petition for the formation of a consolidated school district was filed with the Superintendent of Public Schools of Camden County on May 23, 1925, a majority of the petitioners residing in Camden County. Under the statute, it thereupon became the duty of the Superintendent of Public Schools of that county to visit the community, investigate its needs, and to determine and so locate the boundary lines of the proposed district as would in his judgment form the best possible consolidated district, having due regard to the welfare of adjoining districts. Immediately upon the filing of the petition, jurisdiction over the subject-matter of the proceeding was acquired by, and vested in, the Superintendent of Public Schools of Camden County, and such jurisdiction remained in him until the question of the formation of the proposed consolidated district was determined by the qualified voters of the proposed district at the special meeting called by him for the consideration of that question. The jurisdiction of the subject-matter, first acquired by the Superintendent of Public Schools of Camden County on May 23, 1925, could not be thwarted by the subsequent refusal, on June 2, 1925, of the Superintendent of Public Schools of Laclede County to sign and approve the notices and plats calling for the special meeting of qualified voters to consider the question under consideration, in view of the admitted fact that the matter was immediately appealed to the State Superintendent (respondent herein) by the County Superintendent of Camden County and the decision of the State Superintendent was in favor of the appellant, as evidenced by the State Superintendent's action in

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signing and approving the plats and notices for and on behalf of the County Superintendent of Laclede County. It matters not that the County Superintendent of Laclede County in the forenoon of June 3, 1925 (a few hours before, but on the same day, the notices and plats calling the special meeting for consideration of the question were posted by the County Superintendent of Camden County), posted notices and plats calling for the submission of another and different consolidated district lying wholly within Laclede County. Such action on the part of the County Superintendent of Laclede County was an attempted usurpation of jurisdiction over the subject-matter previously acquired under the statute by the County Superintendent of Camden County and amounted to a positive violation of the statute prescribing the procedural steps to be taken in such proceedings."

To hold otherwise would cause unlimited confusion in annexing and consolidating school districts in this state. As stated in the foregoing decision, it has always been held that courts having coordinate jurisdiction could not assume jurisdiction over a court already having assumed jurisdiction.

In view of what has been said about the validity of the reorganization plan submitted by the Greene County Board of Education for combining the Springfield School District and the Ritter School District, we think this eliminates the necessity of further discussion as to petitions and elections filed and held subsequent to October 20, 1950.

The second petition filed by residents of Ritter School District for annexation with Willard School District would possibly be valid since the first election was void and in the meantime the Schuyler School District, lying between the Ritter and Willard School Districts, had annexed to the Willard School District, thereafter making Ritter and Willard School Districts adjoining, if it had not been for the action taken prior thereto by the Greene County School Board in submitting a reorganization plan to combine Springfield and Ritter School Districts. In view of that reorganization plan and approval by the State Board of Education, the latter petition to annex Ritter and Willard School Districts comes too late.

Furthermore, the declaratory judgment suit still pending

Honorable Milton B. Kirby

in the Circuit Court of Greene County, Missouri, attacking the validity of the first petition filed to annex the Ritter School District with the Willard School District will not affect the reorganization plan unless said court should finally rule that the original petition filed on October 18, 1950, by the residents of Ritter School District to annex the Ritter and Willard School Districts is within the law.

Therefore, the school district formed by the reorganization plan submitted by the Greene County School Board to combine Ritter and Springfield School Districts will be credited with the funds now held in the County Treasurer's Office for the Ritter School District when the directors of the new district are elected. (See Sections 165.687 and 165.690, RSMo 1949.)

In State ex rel. Consolidated School District No. 8 of Pemiscot County v. Smith, 121 S.W. (2d) 160, 343 Mo. 288, the court held that the subsisting school district will be entitled to all the property and is answerable for all the liabilities of the component districts. Also see Gray v. School District No. 73 of Clay County, Missouri, 28 S.W. (2d) 683, 224 Mo. App. 905 (cause transferred from the Supreme Court, 20 S.W. (2d) 657).


CONCLUSION

Our answer to your first question is in the negative. To the second question, it is also negative. To the third question, the school district formed by the reorganization plan of the Greene County School Board to combine the Springfield and Ritter School Districts will be credited with the school funds held by the County Treasurer's Office for the Ritter School District upon election of directors of the newly formed school district under the adopted plan of reorganization. To the fourth question, our answer is in the affirmative for the reason that said warrants are proper obligations of the Ritter School District as of January 8, 1951.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, JR.
Assistant Attorney General

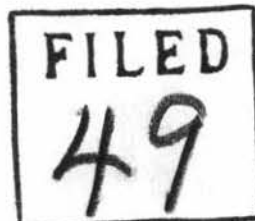

J. E. TAYLOR
Attorney General

ARH:VLM

MOTOR CARRIERS: A motor carrier, using the public highways for the purpose of transporting automobiles in interstate commerce under permit from the Public Service Commission, is not permitted to haul farm products over the public roads of the state without obtaining a permit for that purpose also.

May 18, 1951

Mr. Milton B. Kirby
Prosecuting Attorney
Greene County
Springfield, Missouri



Dear Mr. Kirby:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"The following question is submitted for your consideration:

"The Kenosha Auto Transport Corporation of Chicago, Illinois, which is domiciled in Wisconsin, operates numerous vehicles through Greene County, enroute from Chicago to the west coast. This trucking company has authority from the Missouri Public Service Commission to haul automobiles on Missouri highways. Recently they have made their return trip loaded with raisins, at which time a summons was issued by the Missouri State Highway Patrol for Improper P.S.C. authority.

"A contention is made by Kenosha that such operation in Interstate Commerce is free of operational certificates because raisins are regarded as an unprocessed commodity.

"Would you please advise us of your opinion as to whether or not there are any exemptions from the Public Service Commission Regulations for a truck hauling unprocessed commodities in interstate commerce."

The law governing this question is contained in Sections 390.010 to 390.170, RSMo 1949. The first part of subsection

Mr. Milton B. Kirby

2 of Section 390.060 is as follows: "It is hereby declared unlawful for any motor carrier except as provided in section 390.030 to use any of the public highways of this state for the transportation of persons or property, or both, in interstate commerce without first having obtained from the commission a permit so to do." The commission referred to here is the Missouri Public Service Commission.

The Springfield Court of Appeals invoked this statute in the case of Rainer v. Western Union Telegraph Company, 91 S.W. 2d 202. In the course of that opinion, on page 204, the court said:

"Respondent had no lawful right to contract with the Kent Dairy Products Company to haul, nor to haul the cream in question in interstate commerce, and the Kent Dairy Products Company aided and abetted the unlawful contract of respondent by employing respondent to haul the cream, knowing that respondent had no lawful right to transport the cream over the route in evidence, by reason of the fact that no interstate permit to haul cream in interstate commerce had been granted to Fred Rainer, respondent. Therefore respondent and the Kent Dairy Products Company each violated the provisions of section 5275 of article 8, chapter 33, R.S.Mo. 1929, as amended by the Session Acts of 1931, pp. 314, 315, and each was guilty of a misdemeanor under the section last above mentioned."

The Kenosha Auto Transport Corporation has obtained a permit from the Commission to use the public highways of Missouri for the purpose of hauling motor vehicles. Its authority is limited to this purpose. The order of the Commission in granting this permit is as follows:

"* * * that Interstate Permit No. T-4848 be and the same is hereby issued to Kenosha Auto Transport Corporation to operate as a common carrier over an irregular route in the transportation of motor vehicles for hire by the driveaway, caravan, or other similar method of transportation as follows: From points beyond Missouri to all points within the State and from all points within Missouri to points beyond the State, exclusively in interstate commerce."

Mr. Milton B. Kirby

The Kenosha Auto Transport Corporation is not permitted to haul any goods other than motor vehicles unless an exemption can be found in Section 390.030. This section provides that the statute shall not apply to any of various cases, including "motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to a creamery, warehouse, or other original storage or market." The hauling of unprocessed raisins from farm to market in a truck used for no other purpose would be exempt under this provision of the law. But the Kenosha company is not using its trucks exclusively for any such purpose and, therefore, must confine its operations on the public highways of Missouri to the transportation of automobiles.

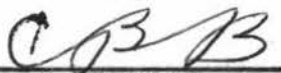
CONCLUSION

It is the opinion of this office that a motor carrier, using the public highways of the state for the purpose of transporting motor vehicles in interstate commerce under permit from the Missouri Public Service Commission, is not permitted to haul unprocessed raisins over the public highways of Missouri without obtaining a permit for that purpose also.

Sincerely yours,

B. A. TAYLOR
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

BATab

MERCHANTS' TAX) A merchant doing business in more than one county
AND LICENSE:) must obtain a license and pay an ad valorem tax
in each county.

September 10, 1951

9-11-51

Mr. Robert G. Kirkland
Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Mr. Kirkland:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"Please furnish this office for the use of the Clay County Collector and Clay County Assessor your official opinion on the following situation:

"On April 23, 1951, a certain corporation opened a branch warehouse for business in North Kansas City, Clay County, Missouri for the purpose of selling and delivering merchandise to customers in the State of Missouri and in other states. Previous to this date and in 1951 the warehouse and business had been maintained and conducted at 1201 Union Avenue, Kansas City, Jackson County, Missouri. The company had previously listed their property for assessment for 1951 in Jackson County and they had obtained a 1951 Merchants and Manufacturers license in Jackson County and furnished a merchants bond in Jackson County. Under Section 150.160 and Section 150.-180 Missouri R.S. 1949, it appears that it will be necessary for this company to obtain a new license in

Mr. Robert G. Kirkland

Clay County and furnish a new bond. Is it your opinion that they must pursuant to these statutes not only do this but also pay state and county personal and property and ad valorem taxes for 1951 in Clay County as well as in Jackson County?"

The statute governing merchants' licenses and taxes is embodied in Chapter 150, RSMo 1949. Section 150.100 provides that no person or business firm "shall deal as a merchant without a license first obtained according to law." Merchants, under Section 150.040, "shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares, and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in January and the first Monday in April in each year." Section 150.160 provides that a merchant, before he shall receive a license, shall execute a bond to the state, conditioned that he will "pay to the collector of the proper county all merchants tax due" before the end of the year.

Section 150.120 is as follows:

"No license granted in virtue of this law shall authorize any person, corporation or co-partnership of persons, to deal in the selling of goods, wares or merchandise in any other county than the one in which said license was granted, nor at more than one place within the proper county at the same time, nor for a longer period than twelve months."

Section 150.180 is as follows:

"When any merchant shall commence the business of merchandising in any county in this state after the first Monday in January, in any year, he shall execute a bond as provided for

Mr. Robert G. Kirkland

in section 150.160, conditioned that he will furnish to the collector of his county a statement, verified as herein required, of the largest amount of goods, wares or merchandise which he had on hand or subject to his control, whether owned by himself or consigned to him for sale, on the first day of any month between the time when he commenced business as a merchant, and the said first day in January next succeeding; upon which statement he shall pay a tax based upon the same rate as other merchants, to be determined by the number of months in business in any calendar year."

These two sections are applicable to the situation explained in your request. A license obtained in one county is not valid in any other county, and a merchant who commences the business of selling goods in another county after the first Monday in January must secure a license in that county and pay the ad valorem tax in accordance with Section 150.180.

This may seem to work a hardship and cause some merchants to complain of double taxation. The law in Missouri may not be entirely equitable, as pointed out by the Supreme Court of Missouri in the case of DeArman v. Williams, 93 Mo. 158. In the course of that opinion, page 162, the court said:

"The assessor is required to make the assessment between the first of June and January (Acts of 1883, p. 134), and, from the oath prescribed by section 2, Acts of 1881, p. 179, it is clear that the list must include all property owned on the first day of June. Plaintiff, being a resident of Johnson County from June 1 to December 1, 1882, his personal property was liable to taxation in that county for the year known as the tax-year of 1883. His subsequent removal to Bates county did not prevent the officers of Johnson county from extending and

Mr. Robert G. Kirkland

collecting the tax, nor does the fact that he, in 1883, invested the money in a stock of goods, and paid a merchant's license in Bates county for 1883, relieve him from the payment of the Johnson county tax. Had he remained in Johnson county, and there conducted a mercantile business, he would have had to pay a merchant's tax, though it is a tax for revenue. In the case of City of Kansas v. Johnson, 78 Mo. 661, the law required every person owning property on the first of January to pay a tax thereon for the fiscal year beginning on the third Monday of April thereafter. Johnson had paid a merchant's-license tax for the year ending April 15, 1878, and another on an entirely different stock of goods, for the year ending in 1879. He sold the first stock of goods in March, 1878, and the goods were then removed from the state; still it was held that he must pay a tax for that stock, also, for the fiscal year of 1878, because he owned the goods on and after January 1, 1878. Perfect equality in taxation is not attainable, and we do not regard either of the taxes in question in this case as violative of section 3, article 10, of the constitution, which declares that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

The law pertaining to the assessment and taxation of tangible personal property, other than merchandise, belonging to a business corporation is contained in Section 137.095, RSMo 1949, which is as follows:

"All tangible personal property of business and manufacturing corporations shall be taxable in the county in which such property may be situated on the first day of January of the year for which such taxes may be assessed, and

Mr. Robert G. Kirkland

every business or manufacturing corporation having or owing tangible personal property on the first day of January in each year, which shall, on said date, be situated in any other county than the one in which said corporation is located, shall make return thereof to the assessor of such county or township where situated, in the same manner as other tangible personal property is required by law to be returned."

The assessment year begins on the first day of January, and the property of a corporation, tangible personal property as well as real estate, is taxable on that date in the county in which such property is situated at said time. Property acquired in any county after the first day of January is not taxable for the current year.

CONCLUSIONS


It is the opinion of this office that the said corporation, having commenced the business of merchandising in Clay County in April of the present year, must obtain a merchant's license in said county and execute a bond and pay an ad valorem tax in said county in accordance with Section 150.180, RSMo 1949.

It is also the opinion of this office that the said corporation is not liable for taxes on real estate or tangible personal property, other than merchandise, in Clay County for the current year unless said corporation owned or held such property in said county on the first day of January.

Respectfully submitted,

APPROVED:

B. A. TAYLOR
Assistant Attorney General

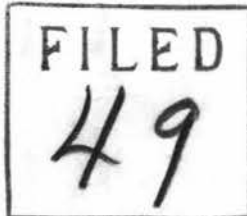


J. E. TAYLOR
Attorney General

BAT/fh

COUNTY COLLECTOR:
TAX LIEN:

Realty may not be held for taxes
on improvements separate from
the realty and so assessed.



November 23, 1951

11-28-51

Honorable Milton B. Kirby
Prosecuting Attorney of
Greene County
Springfield, Missouri

Dear Sir:

Reference is made to a recent request from your office for
an official opinion of this department, which request reads as
follows:

"The County Collector of Greene County,
Missouri, and the County Assessor of
Greene County, Missouri, have had a
question arise in connection with the
assessment of improvements on land made
separately from the assessment on the
land itself where ownership is in one
person for the land and in another
person for the buildings and improvements.

"These two county officers have requested
the following questions be referred to your
office for an expression of opinion:

"In event the taxes are paid regularly on
the land assessment by the owner thereof
and the taxes on the improvements or build-
ings become delinquent and are not paid
and before collection of such taxes on the
improvements is made or can be made the
building itself is destroyed or removed, does a

Honorable Milton B. Kirby

lien exist against the land for the taxes on the improvements?

"In other words, does the Collector hold the land for taxes on a building built thereon under a lease agreement under the terms of which the building remains under separate ownership and does not revert to the land owner at the expiration of the lease?

We infer from your request that the leasehold estate and improvements were assessed to one person and the land subject to the lease assessed to the lessor or owner thereof. You then inquire whether the land is subject to a lien for nonpayment of taxes on the improvements.

Under the tax laws of Missouri, real property and tangible personal property is assessed in the name of the owner. Real property is subject to a lien for the taxes imposed thereon, a valid assessment being a prerequisite to the imposition or enforcement of such lien. We are of the opinion that under the circumstances you have presented, assuming no provision in the lease regarding such taxes, the land cannot be held to be subject to taxes on the improvements for very obvious reasons. First, the improvements were assessed separate and apart from the realty. Second, the improvements do not constitute a part of the realty, for under the lease agreement, ownership of the improvements remained in the lessee and does not revert to the land owner at the expiration of the lease.

An almost identical situation was presented in the case of State ex rel. Ziegenhein v. Missouri Free School, et al., 162 Mo. 332. A building was erected on the leasehold estate by the lessee under the terms of a lease which provided that the building should not become a part of the realty but should remain the property of the lessee. It was sought to charge the realty with the taxes on the improvements which had not been assessed separately. The court in its opinion said:

"* * *It is thus evident that, as between the said Mission School and said Thompson, Thompson is the owner of the leasehold and building and is liable for the taxes thereon whether it is real estate or personal property, but as said in State ex rel. Thompson, 149 Mo. 445, before he can be compelled to respond for

Honorable Milton B. Kirby

said taxes, his estate in said leasehold and building must first be assessed against him as the owner thereof. 'A valid assessment has invariably been held an essential prerequisite to the lawful exercise of the power of taxation in this State.' (State ex rel. v. Thompson, supra; Abbott v. Lindenbower, 42 Mo. 162; State ex rel. Wyatt v. Railroad, 114 Mo. 1.)"

See also Leach v. Goode, 19 Mo. 502, at page 503:

"When a lease is made, without any stipulation about taxes the landlord is bound to pay the taxes upon the property; but if the tenant, by the erection of buildings, which, by the terms of lease, continue his property, and which he is either authorized to remove, or is entitled to be compensated for by the landlord, enhances the taxes, the landlord is not bound to pay taxes upon the improvements.* * *"

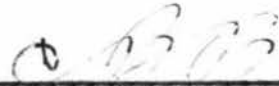
CONCLUSION

Therefore, it is the opinion of this department that where improvements are erected on realty by a lessee, under the terms of a lease, whereby the improvements remain the property of the lessee and such improvements are assessed in the name of the lessee and the land is not subject to a lien for delinquent taxes on such improvements.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

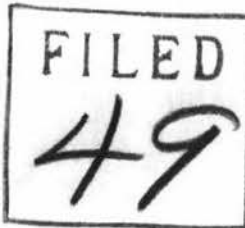
APPROVED:



J. E. TAYLOR
Attorney General

DDG:hr

REVENUE LAWS:
MAGISTRATE COURTS:



Suits to collect taxes, which suits are based upon revenue laws of this state, may be heard and determined in magistrate court if the meaning, validity and application of such law or laws is not an issue in the case, so long as the total amount sued for does not exceed the jurisdiction of the magistrate court.

November 28, 1951

12-3-51

Honorable Milton B. Kirby
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

"A question has arisen as to the jurisdiction of the Magistrate Court to hear and determine suits to collect taxes such as Merchants, Sales, Income and General Personal taxes, and the Magistrate Judges of Greene County have requested that I obtain an opinion from you.

"Your attention is called to Section 482.100, paragraph 1, R. S. Mo. 1949, which states that

"'No Magistrate shall have jurisdiction to hear or try any action involving *** the construction of revenue laws of this State, ***'

"In view of this statute, the Magistrate Judges of this county are of the opinion that the Magistrate Court has no jurisdiction to hear and determine any suit for the collection of any of the aforementioned taxes."

Your inquiry to us is whether suits to collect taxes "such as" merchants, sales, income, and "general personal" taxes may be heard and determined in a magistrate court in view of Section 482.100, RSMo 1949, paragraph 1, which states:

Honorable Milton B. Kirby

"No magistrate shall have jurisdiction to hear or try any action involving the construction of the constitution of the United States or of this state, the validity of any treaty or statute of the United States or any authority exercised under the laws of the United States, the construction of revenue laws of this state, the title to any office under this state, or the title to real estate."

In the case of Long v. City of Independence, 229 S.W. 2d 686, the court said, 687:

"* * * As the city taxes in issue were general taxes for public governmental purposes, construction of the revenue laws is involved and the appeal is properly here. Art. V. Sec. 3, 1945 Const. Mo. R.S.A.; Pearson Drainage Dist. v. Erhardt, Mo. Sup., 196 S.W. 2d 855; State ex rel. Lane v. Corneli, 347 Mo. 932, 149 S.W. 2d 815; State ex rel. Divine v. Collier, 301 Mo. 72, 256 S.W. 455; Kansas City Exposition Driving Park v. Kansas City 174 Mo. 425, 74 S.W. 979; and City of Stanberry v. Jordan, 145 Mo. 371, 46 S.W. 1093. * * *"

(Underlining, ours.)

From the above case, we obtain a definition of "revenue laws of this state," which definition is that "revenue laws of this state" are laws providing revenue "for public governmental purposes."

Numerous other cases directly and inferentially affirm this definition, and none dispute it.

Let us now address ourselves to the question of whether every suit filed to collect taxes, which suit is based upon laws which are "revenue laws of this state," involves, ipso facto, a construction of the "revenue laws of this state," and, if we find that not every suit filed to collect taxes, which suit is based upon the revenue laws of this state, involves, ipso facto, a construction of the revenue laws of this state, then which suits do, and which suits do not, involve a construction of the revenue laws of this state.

Honorable Milton B. Kirby

In order to obtain much needed light upon this matter, we direct your attention to the case of *State ex rel. v. Adkins*, 221 Mo. 112. This case directly involves county depositaries and as such does not bear upon our particular point of inquiry. The case is of value to us insofar as in it there are discussed some eleven other cases in which the courts variously held that a construction of the revenue laws of this state was, or was not, involved. We deem it unnecessary here to discuss each of these cases, or to quote the court's discussion of them. We do, however, give the general conclusion of the court after its consideration of these cases, which conclusion is, l.c. 118:

"From a review of the cases we conclude:
(1) That when our jurisdiction is put upon the ground that the construction of the revenue laws of the State is involved, the law up for construction must be a State law as contradistinguished from the provisions of a special city charter; (2) that it makes no difference where the law is to be found, whether under the title of 'revenue' or any other title, so long as it relates to the subject-matter of revenue; (3) that the revenue must be directly and primarily concerned, not merely indirectly or as an incident; (4) that the term 'revenue law' covers and includes laws relating to the disbursement of the revenue and its preservation as well as provisions relating to the assessment, levy and collection of it; and (5) finally, that where the question in the case is merely one relating to the general practice in circuit courts or before justices of the peace, although the case may pertain to the collection of taxes, yet the revenue laws are not involved in a constitutional sense."

We will now proceed to a consideration of other cases bearing upon our problem.

The case of *State v. Hemmerberger-Harrison Lumber Company*, 25 S.W. 2d 489, was one in which defendant was sued by the Collector of New Madrid County to collect taxes assessed against defendant's property. Defendant contended that the assessment

Honorable Milton B. Kirby

was illegal. The Supreme Court of Missouri, 58 S.W. 2d 750, took jurisdiction on the ground that a construction of the revenue laws of this state was involved.

The case of White et al. v. Boyne et al., 23 S.W. 2d 107, was one of a bill by taxpayers to have a school tax levy made by a consolidated school district declared void. The Supreme Court of Missouri refused to take jurisdiction on the ground that a construction of the revenue laws of this state was not involved. In its opinion, the court said, l.c. 108:

"No revenue law of this state is to be construed, nor is any such law mentioned in the briefs. In order to give this court jurisdiction of the case on the ground that it involves the construction of the revenue laws of the state, the revenue law must be directly and primarily concerned, and not merely indirectly or as an incident. State ex rel. Hadley v. Adkins, 221 Mo. 112, loc. cit. 118, 119 S.W. 1091. In that case Judge Lamm cited many cases and elaborated the doctrine at length. Likewise, as said in that case, where the question is merely one relating to the general practice in the courts, although the case may pertain to the collection of taxes, yet the revenue laws are not involved in a constitutional sense. The conclusions there have been approved in later cases. State ex rel. v. Reynolds, 243 Mo. 715, loc. cit. 722, 148 S.W. 623; Moss Tie Co. v. Allen, 318 Mo. 440, 300 S.W. 486."

The case of State v. Atchison, Topeka and Santa Fe Railway Company, 275 S.W. 932, was an action by the Collector of Clark County to recover a sum alleged to be due in taxes. Defendant refused to pay on the ground that under the law of 1921, the levy for 1921 for county purposes in Clark County exceeded the levy for like purposes in 1920 by more than ten per cent. The Supreme Court of Missouri took jurisdiction on the ground that a construction of the revenue laws of Missouri was involved.

The case of In re First National Safe Deposit Company, 173 S.W. 2d 403, was a proceeding to abate the assessment of an income tax. The Supreme Court of Missouri took jurisdiction

Honorable Milton B. Kirby

on the ground that the construction of the revenue laws of this state was involved.

The case of T. J. Moss Tie Co. v. Allen, 318 Mo. 440, was an equity suit in which appellant sought to enjoin the tax collector of Oregon County, Missouri, from collecting taxes on certain land owned by the appellant. In the course of that opinion, the court said, l.c. 443:

"* * * Furthermore, we find nothing in the entire record of the case indicating that defendant has anywhere joined issue with plaintiff as to the construction or meaning of these constitutional provisions or any revenue law or statute. Plaintiff frankly concedes, and at every stage of the case has conceded the construction and meaning given them by plaintiff, to-wit, that there can be no classification of property for the purpose of taxation, and that all property subject to taxation must be taxed in proportion to its value. The sole issue between the parties is one of fact, namely, whether the things admitted to be violative of these provisions were actually done in this case. As this court said in Kircher v. Evers, 238 S.W. 1086, speaking through James T. Blair, J., 'the controversy did not arise on this phase of the case, out of a difference of opinion as to what the section mentioned means, but did arise rather upon the question of fact whether the things said to be violative of that section had been done.' What was further said in the same opinion, l.c. 1087, is also true of this case, to-wit: 'It is clear that this record, in view of what has been said, does not show that a constitutional question was "inexorably involved" (Lohmeyer v. Cordage Co. 214 Mo. 685, 113 S.W. 1108) in the sense in which those words are used in connection with the question of appellate jurisdiction."

"Being satisfied that there is no issue in this case which calls for the construction of a revenue statute or law, and that we are without jurisdiction to entertain this appeal, it is ordered that the cause be transferred to the Springfield Court of Appeals for its determination. All concur."

(Underlining, ours.)

Honorable Milton B. Kirby

In addition to the above cases which we have cited, there are numerous other cases relating to the matter in question, which cases we have carefully considered. To review all of them here is not practicable, and would not, we believe, further serve our purpose inasmuch as the opinions not cited fall into the same pattern as those which are cited. From a consideration of all of these cases, certain facts appear to us to clearly emerge. One of these is that every case, in which the courts held that a construction of the revenue laws of this state was involved, was a case in which either the meaning, the validity, or the applicability to the subject of the suit, of a tax law, was involved. In some of these cases the necessity of determining the meaning of a tax law and/or its applicability or validity was evident from the petition, and in others, the issue was raised in the answer of the defendant. We observe that in none of the cases cited, and in none of those other cases considered by us and not cited, did the courts hold that a construction of the revenue laws of this state was involved where the suit was for a tax judgment, and where the meaning, validity, or applicability of the tax laws was not raised by either party or was not evidently present from the petition or answer.

We, therefore, conclude that not every suit to collect taxes involves, ipso facto, a construction of the revenue laws of this state, and that a construction of the revenue laws of this state is involved only where the meaning, validity and/or the applicability of such laws is or becomes an issue in the case.

CONCLUSION

It is the opinion of this department that suits to collect taxes, which suits are based upon revenue laws of this state, may be heard and determined in magistrate court if the meaning, validity, and application of such law or laws is not an issue in the case, so long as the total amount sued for does not exceed the jurisdiction of the magistrate court.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HPWab

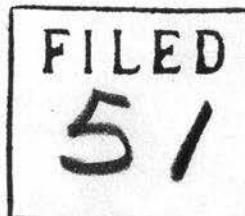
SENATORIAL REDISTRICTING)
COMMISSION)

The commission must file its report
not later than July 19, 1951.

May 22, 1951

5-22-51

Mr. H. P. Lauf
Attorney at Law
509 Central Trust Building
Jefferson City, Missouri



Dear Mr. Lauf:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"The Senatorial Redistricting Commission, at its meeting on Monday, May 14, 1951, authorized the undersigned, for and on behalf of the Commission to request your opinion upon the following question:

"1. Under the Constitution and the statutes, what is the final date on which the Commission must file its report with the Secretary of State?

"The Commission will greatly appreciate an early reply."

Section 7, Article III, Constitution of the State of Missouri, 1945, which governs this question, is as follows:

"Within sixty days after this Constitution takes effect, and thereafter within sixty days after the population of the state is reported to the President for each decennial census of the United States, the state committee of each of the two political parties casting the highest vote

Mr. H. P. Lauf

for governor at the last preceding election shall submit to the governor a list of ten persons, and within thirty days thereafter the governor shall appoint a commission of ten members, five from each list, to reapportion the thirty-four senators and the numbers of their districts among the counties of the state. If either of the party committees fail to submit a list within such time the governor shall appoint five members of his own choice from the party of such committee. Each member of the commission shall receive fifteen dollars a day, but not more than one thousand dollars. The commission shall reapportion the senators by dividing the population of the state by the number thirty-four, and the population of no district shall vary from the quotient by more than one-fourth thereof. The commission shall file with the secretary of state a full statement of the numbers of the districts and the counties included in the districts, and no statement shall be valid unless approved by seven members. After the statement is filed senators shall be elected according to such districts until a re-apportionment is made as herein provided, except that if the statement is not filed within six months of the time fixed for the appointment of any such commission it shall stand discharged and the senators to be elected at the next election shall be elected from the state at large, following which a new commission shall be appointed in like manner and with like effect. No such re-apportionment shall be subject to the referendum."

The state committees of the two major political parties must submit their lists to the governor within sixty days after the population of the state has been reported to the President for the decennial census of the United States. The governor then has thirty days in which to appoint the

Mr. H. P. Lauf

commission. This is the time period fixed for the appointment, and the commission must complete its work and file its statement with the secretary of state within six months after the expiration of this thirty-day period.

According to the records at the governor's office, the Republican state committee submitted its list on December 19, 1950; and the Democratic state committee filed its list on December 20, 1950. The commission was appointed by the governor on January 19, 1951. The time fixed for the appointment ran from December 20, 1950, to January 19, 1951, being exactly thirty days. The commission must finish its work and file its report within six months after January 19, 1951.

The terms "month" and "year" are defined in subsection (6) of Section 1.020, RSMo 1949, which is as follows:

"(6) 'Month' and 'year.' The word 'month' shall mean a calendar month, and the word 'year' shall mean a calendar year unless otherwise expressed, and the word 'year' shall be equivalent to the words 'year of our Lord';"

The statute governing the computation of time is embodied in Section 1.040, RSMo 1949, which is as follows:


"The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day be Sunday it shall be excluded."

CONCLUSION

It is the opinion of this office that the commission must file its full statement with the secretary of state not later than July 19, 1951.

Respectfully submitted,

APPROVED:



J. E. TAYLOR
Attorney General

B. A. TAYLOR
Assistant Attorney General

BAT/fh

INSURANCE: Section 379.255 and Section 379.080, RSMo 1949 to be read together. Mutual and stock companies comprehended in said sections are permitted to invest assets in loans secured by real estate or personal property as collateral, after first investing in prime securities named in Section 379.080, RSMo 1949, in an amount required to meet paid-up capital in stock companies.

April 2, 1951

4-2-51



Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Sir:

The following opinion is rendered in reply to your recent request reading as follows:

"The M.F.A. Mutual Insurance Company is an insurance company organized under the insurance code of the State of Missouri, and particularly under Article 7, Chapter 37, R. S. Missouri, 1939. Section 379.255, R. S. 1949, provides how the assets of a mutual company organized under Article 7 may be invested. This section states that the assets may be invested in the same manner as those of stock company. Section 379.080 makes a provision as to how the assets of a stock company may be invested.

"It is the contention of the M.F.A. that this section requires them to invest the first \$200,000.00 in either cash, government bonds, or improved unencumbered real estate worth double the amount loaned thereon. It is their further opinion that the balance of their assets may be invested in loans on growing crops, livestock, automobiles and other personal property up to 80% of the value thereof. They are of the further opinion that all assets over \$200,000.00 may be invested in real estate up to 80% of the value thereof.

Honorable C. Lawrence Leggett

"I am enclosing herewith for your information copies of a brief submitted by the M.F.A. and a memorandum of the counsel of this Department. Will you please advise me: (1) Whether or not an Article 6 company may invest its assets over and above the amount of its capital stock in loans or personal property up to 80% of the value of the personal property. (2) Whether or not an Article 6 company may invest its surplus over and above the amount of its capital stock in real estate up to 80% of the value thereof. (3) In the event the investments mentioned in (1) and (2) may be made by an Article 6 company out of the assets above its capital stock, at what point may an Article 7 company begin its investments in similar assets?"

M.F.A. mutual insurance company was incorporated under the provisions of Article 7, Chapter 37, R. S. Missouri, 1939, and Section 5960 of said Article 7 is now found at Section 379.255, RSMo 1949, and provides as follows:

"No such company shall invest any of its assets except in accordance with the laws of this state relating to the investment of the assets of domestic stock companies transacting the same kinds of insurance."

Domestic stock companies referred to in Section 379.255, RSMo 1949 are specifically governed by Section 379.010 to 379.200, inclusive, RSMo 1949. Section 379.080, RSMo 1949 provides for the specific types of securities in which a required portion of the paid-up capital of a stock insurance company may be invested, and further provides as follows with respect to the investment of the remaining capital and assets:

"* * * and the remainder of the capital of said companies and their other assets may be invested either in the property or securities in this section above mentioned, or in loans safely secured by collateral worth, at its cash market value, not less than 20% in excess of the amount loaned thereon, * * *."

Honorable C. Lawrence Leggett

The quoted excerpt from Section 379.080, RSMo 1949, was first inserted in the section by amendment to Section 7008, R. S. Missouri 1909, and accomplished by Laws of Missouri, 1911, page 271, and has remained unchanged to the present time. Section 379.080, RSMo 1949, was formerly Section 5918, of Article 6, Chapter 37, R. S. Missouri 1939, such article being referred to in paragraph 3 of the opinion request, and said section was the subject of amendment as late as 1947.

Section 379.080, RSMo 1949, is clear in its language relative to the investment of a company's assets over and above a stated paid-up capital, and the only additional requirement is that such assets be invested in loans safely secured by collateral worth, at its cash market value, not less than 20% in excess of the amount loaned thereon. The particular provision of this statute with which we are dealing is silent as to whether the loans allowed are to be made with real estate or personal property as collateral. No unsecured loans to individuals or corporations are authorized by the provision being construed. Each loan is to be secured by collateral having a cash market value. The statute contains no prohibition against securing the loans by personal property as collateral. The legislature has set a rule by which we are to determine when a loan is safely secured by collateral other than by specific collateral named in Section 379.080, RSMo 1949. Using the pronounced rule, there appears to be no prohibition in Section 379.080, RSMo 1949, against an insurance company subject to such statute from investing its assets over and above the amount of its capital stock, required to be paid up, in loans secured by personal property up to 80% of the value of the personal property.

What has been said relative to the use of personal property as collateral for loans out of funds over and above the capital stock requirement of an insurance company subject to the provisions of Section 379.080, will apply likewise to loans made with real estate as collateral. The statute makes no distinction between real estate and personal property as collateral and such a distinction may not be read into the statute.

Having determined that a domestic stock insurance company subject to the provisions of Section 379.080, RSMo 1949, may invest its assets, not necessary to secure its capital stock fund, in loans secured either by real estate or personal property as collateral, we come to the third and final question posed in the opinion request.

Honorable C. Lawrence Leggett

In view of the fact that a mutual insurance company formed under the provisions contained in Sections 379.205 to 379.310, inclusive, RSMo 1949, is formed without a paid-up capital stock, what portion of its assets must be invested in the prime securities mentioned in Section 379.080, RSMo 1949, before it is allowed to make loans secured by real property or personal property as collateral? Since Section 379.255, RSMo 1949, heretofore cited, directs that such mutual insurance company is to invest its assets in accordance with provisions contained in Section 379.080, RSMo 1949, the mutual insurance company must first invest its assets in the prime securities specifically described in the section in the same amount required of stock companies, before it may invest its assets in loans secured by personal property or real property as collateral. In no other way may the statute be made to apply equitably to both stock and mutual companies.

CONCLUSION


It is the opinion of this department:

- (1) That domestic stock insurance companies formed under the provisions contained in Section 379.010 to 379.200, inclusive, RSMo 1949, may invest its assets over and above the amount of its capital stock in loans or personal property up to 80% of the value of the personal property;
- (2) That domestic stock insurance companies formed under the provisions contained in Section 379.010 to 379.200, inclusive, RSMo 1949, may invest its surplus over and above the amount of its capital stock in real estate up to 80% of the value thereof.
- (3) That an insurance company formed under the provisions contained in Section 379.205 to 379.310, inclusive, RSMo 1949, may invest its assets in loans on personal property and real estate up to 80% of the value of such personal property and real property after it has first invested in the prime securities mentioned in Section 379.080, RSMo 1949, in an amount equal to the required paid-up capital of stock insurance companies named in said Section 379.080, RSMo 1949.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

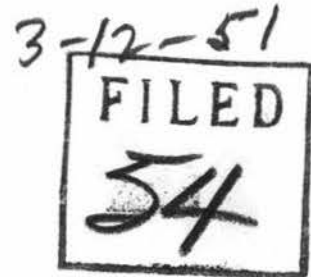
APPROVED:


J. E. TAYLOR
Attorney General

SOIL CONSERVATION DISTRICTS: Each elected member of the Board of Supervisors for each Soil Conservation District must be Elected for a term of two years.

March 12, 1951

Honorable J. H. Longwell, Chairman
Missouri State Soil Districts Commission
128 Mumford Hall
Columbia, Missouri



Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"The State Soil Districts Commission requests a statement regarding the terms of office of the supervisors of soil conservation districts.

"Section 5 of Senate Bill 80 of the 62nd General Assembly provides for a board of five supervisors for each soil conservation district, one of which shall be the county extension agent, the other four to be land representatives resident tax paying citizens within that soil district elected by a majority vote of land representatives under rules and procedures formulated by the soil commission. The four elected members shall serve for two years, and in case of the death, removal of residence from the county, or resignation from office of any elected member this successor to the unexpired term shall be appointed by the State Soil Districts Commission.

"The Soil Districts Commission has interpreted this provision of the law as meaning that the four elected supervisors are elected at the time the district is established, all serve two years and all may be reelected for two year terms or successors may be elected in place of one or more of them, again for a two year term.

"In actual practice this method sometimes has resulted in four new and inexperienced supervisors being elected to succeed the outgoing supervisors, with the result that the work of

Honorable J. H. Longwell

the district has suffered until the new supervisors have had time to become familiar with their duties and responsibilities.

"The Commission believes that if the terms of the supervisors were staggered so that the terms of two supervisors expire each year the work of the board of supervisors would be greatly improved due to the carry-over of two experienced supervisors each year. The Commission suggests that, at their next regular election of supervisors, each district elect two supervisors for one year and two for two years, thereafter holding an annual election to elect two supervisors for two year terms. Would this practice be legal under the provisions of the law?"

The law regulating the establishment of the Boards of Soil Conservation Districts is found in Section 278.110, RSMo 1949. The portion of this section which is pertinent to your inquiry reads as follows:

"1. The state soil districts commission upon declaring the establishment of a soil district as provided in section 278.100 shall proceed to arrange in the following manner for the establishment of a board of soil district supervisors to act as a local governing body for such soil district. This board shall consist of five members, as follows: Ex officio, the county agricultural extension agent; and four land representatives resident taxpaying citizens within that soil district for a period of two years next preceeding such election and elected by the majority vote of land representatives under rules and procedures formulated by the soil commission, but the date of this election shall not fall upon the date of any regular political election held in that county.

"2. The term of office of the ex officio member shall be coincident with his term in the office from which he shall be serving on the supervisory board. The four elected members shall each serve for two years, and in case of the death, removal of residence from the county, or resignation from office of any elected

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member his successor to the unexpired term shall be appointed by the state soil districts commission, and such appointee shall be a resident land representative of that county. A soil supervisor may succeed himself by re-election in this office."

From the above, it seems clear to us that the length of term of each of the four elected members cannot be changed by the Missouri State Soil Districts Commission, but that the clear directorate of the law must be followed and that each elected member of the Board of Soil Conservation District must be elected for a two year term. The Legislature alone can change the length of such term of office.


CONCLUSION

Each elected member of the Board of Supervisors for each Soil Conservation District must be elected for a term of two years.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

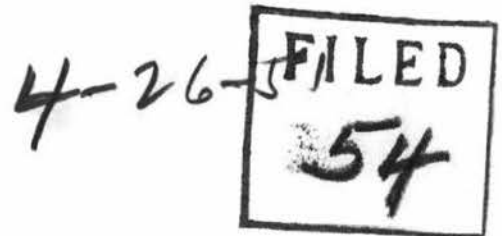


J. E. TAYLOR
Attorney General

HPWab

MOTOR VEHICLES: Trailers not subject to staggered registration provisions, nor subject to penalty fee for delinquent registration. Registration fee of \$3.00 cannot be prorated.

April 26, 1951



Honorable H. M. Long,
Assistant Supervisor, Motor Vehicle Registration
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion of this department reads in part as follows:

"* * * Are Trailers to be registered under Permanent-Staggered Registration Law? Are Trailers subject to delinquent fee? Are Trailers to be registered at a flat fee of \$3.00 irrespective of date of application for such registration or is the fee to be pro-rated?"

Section 301.020, RSMo 1949, provides in part:

"Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, except as herein otherwise expressly provided, shall file, by mail or otherwise, in the office of the director of revenue, an application for registration on a blank to be furnished by the director of revenue for that purpose, * * *"

Section 301.060, RSMo 1949, provides for the annual registration fees of motor vehicles and trailers. Section 301.060(3) reads:

"The annual registration fee shall be as follows:

"(3) For each trailer or semitrailer there shall be paid a fee of three dollars. The fees for tractors used in any combination

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with trailers or semitrailers or both trailers and semitrailers shall be computed on the total gross weight of the vehicles in the combination with load."

The 64th General Assembly has provided for a system of staggered registration of motor vehicles and permanent use of license plates. Section 301.030, RSMo 1949, provides in part:

"1. The director of revenue shall provide for the retention of license plates by the owners of motor vehicles and shall establish a system of registration on a monthly series basis to distribute the work of registering motor vehicles as uniformly as practicable throughout the twelve months of the calendar year. * * *"
(Underscoring ours.)

An examination of Section 301.030, supra, and the other statutory provisions relating to permanent-staggered registration reveals that these sections mention only the term motor vehicles in connection therewith. In none of these provisions do we find the word trailer mentioned. The first question, therefore, is whether or not trailers are to be considered motor vehicles with respect to the permanent-staggered registration provisions.

Section 301.010, RSMo 1949, is a definition statute providing that for the purposes of Chapter 301, certain terms and words shall have the meanings stated therein. Section 301.010(12) defines motor vehicles as follows:

"'Motor vehicle,' any self-propelled vehicle not operated exclusively upon tracks, except farm tractors;"

The word trailer is defined as follows in Section 301.010(23):

"'Trailer,' any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by self-propelled vehicle, except those running exclusively on tracks, including a semitrailer or vehicle of the trailer type so designed and used in conjunction with a self-propelled vehicle that a considerable part of its own weight rests upon and is carried by the towing vehicle;"

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It is evident from the statutory definitions that trailers cannot be held to be embodied in the term motor vehicles. Therefore, since the permanent-staggered registration provisions relate only to motor vehicles, it must be concluded that trailers are not subject to registration under these provisions.

The second question presented is whether or not late registration of trailers will warrant the collection of a delinquency fee. This question involves the construction of Section 301.050, RSMo 1949, which section reads as follows:

"All registration fees shall be payable to the director of revenue and shall accompany the application for registration. The fees payable during the seventeen months commencing January 1, 1949, and ending May 31, 1950, for the registration of motor vehicles as defined in section 301.030, shall be computed on the basis of one-twelfth of the full year's registration fee prescribed for such vehicles in section 301.060, multiplied by the number of months for which said motor vehicles shall be required to be registered. After June 1, 1950, a penalty fee of two dollars shall be paid on all delinquent registrations."

To arrive at a proper construction of Section 301.050, we must consider the history of this statute. The system of staggered registration for motor vehicles was provided for by the 64th General Assembly in House Bill No. 273, found in Laws of Missouri, 1947, page 380. This system is set up by Sections 8369a to 8369h of House Bill No. 273. Within these sections, we find Section 8369c which has become Section 301.050, RSMo 1949.

Regarding the construction of statutes we find the court stating in the case of *State ex inf. v. Broeker*, Mo. App., 11 S.W. (2d) 81, 1.c. 83 that:

"It is well understood that the object of all rational construction of statutory enactment is to seek out and effectuate the purpose and intent of the lawmaking body in enacting the same; that such intent is to be determined from a general view of the entire act with reference to

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the subject-matter to which it applies; and that sections of the same act relating to the same general subject, and enacted at the same time, must be read and construed together in interpreting the act and parts thereof. State ex rel. v. Davis, 314 Mo. Sup. 373, 284 S.W. 464; Palmer v. Omer, 316 Mo. 1188, 295 S.W. 123; Betz v. Kansas City Southern Ry. Co., 314 Mo. 390, 284 S.W. 455; Consolidated School District v. Hackmann, 302 Mo. 558, 258 S.W. 1011."

Therefore, since Section 301.050, was originally enacted as an integral part of the act providing for staggered registration of motor vehicles and since trailers are not subject to the staggered registration provisions, it is our conclusion that the delinquent fee provided for in Section 301.050, was intended to apply only to the delinquent registration of motor vehicles and is not applicable with regard to delinquent registration of trailers. Furthermore, there is no other statute providing for a penalty fee for the delinquent registration of trailers and it must be concluded that no penalty can be collected for the delinquent registration of trailers.

The last question presented in your opinion request is whether or not trailers are to be registered at the flat fee of \$3.00 provided for by Section 301.060, supra, irrespective of the date of application for such registration or can the fee be prorated. There is no specific statutory authority for the proration of trailer registration fees.

With regard to the registration of license fees we find the general rule stated in the case of Northern Kentucky Transportation Co., v. City of Bellevue, 285 S.W. 241, 1.c. 243, 215 Ky. 514, as follows:

"The general rule upon this subject is stated as follows: If a statute authorizing the levy of a fixed amount as an annual business license makes no provision for a pro rata license, a person commencing business in the latter part of the year must pay the full amount of the license required to be assessed."

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and in the case of Commonwealth v. McCarthy, 3 Atl. (2d) 267, 1.c. 269, 332 Pa. 465, the court stated that:

"* * *In the absence of a legislative direction for the proration of the tax, such a provision cannot be supplied by implication in favor of places which discontinue business during a part of the year."

Therefore, since the legislature has failed to provide for the proration of trailer registration fees it must be concluded that the full fee of \$3.00 must be paid regardless of the date of application for such registration.

CONCLUSION


It is therefore the opinion of this department that:

1. Trailers are not to be registered under the provisions regarding staggered registration and permanent use of license plates as these provisions are applicable only to the registration of motor vehicles.
2. There is no penalty fee to be paid on delinquent registration of trailers.
3. The full registration fee of \$3.00 must be paid regardless of the date of application for the registration of trailers as there is no provision for the proration of this fee.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RHV:ba

OFFICER: Marshal of city of third class may be removed
under Section 77.340, RSMo 1949, even in absence
MUNICIPALITIES: of ordinance.

November 26, 1951



11-27-51

Honorable Edward V. Long
Senator, 66th General Assembly
State Capitol Building
Jefferson City, Missouri

Dear Sir:

We are in receipt of your recent letter requesting an official opinion of this department which letter reads in part as follows:

"Does a city of the Third Class have the authority to remove the City Marshall, who is an elective officer, from his office for misconduct. Section 77.340, Revised Statutes of Missouri, 1949, and Section 85.600, Revised Statutes of Missouri, 1949, seem to touch on the matter, although the Ordinances of the city in question are silent about the removal from office of any official.

"I will appreciate it if you will advise me whether or not such city has the authority to remove such officer under such Sections, even though not set out by City Ordinance."

We assume that the marshal in question is an officer of a city incorporated under Chapter 77, RSMo 1949, which contains the general statutory provisions relating to cities of the third class. In such cities, the marshal is an elective officer as is provided by Section 77.370, RSMo 1949.

Honorable Edward V. Long

Section 77.340, RSMo 1949, provides for the removal of elective officers of cities of the third class. Section 77.340 reads:

"The mayor may, with the consent of a majority of all the members elected to the city council, remove from office, for cause shown, any elective officer of the city, such officer being first given opportunity, together with his witnesses, to be heard before the council, sitting as a court of impeachment. Any elective officer may, in like manner, for cause shown, be removed from office by a two-thirds vote of all the members elected to the city council, independently of the mayor's approval or recommendation. The mayor may, with the consent of a majority of all the members elected to the council, remove from office any appointive officer of the city at will; and any such appointive officer may be so removed by a two-thirds vote of all the members elected to the council, independently of the mayor's approval or recommendation. The council may pass ordinances regulating the manner of impeachment and removals."

As you have stated in your letter above, no ordinance has been passed in the instant case providing for the removal of city officials. The first question presented is whether the marshal may be removed in the absence of any ordinance providing for such removal.

In the case of State ex rel. v. Walker, 68 Mo. App. 110, the mayor of a third class city was removed under the provisions of Section 11, Sess. Acts, 1893, p. 65, which Section is now Section 77.340, supra. Here too, there had been no ordinance providing for removals passed. The court stated at l.c. 117 that:

"It is contended by the relator that since the council had not passed an ordinance regulating the manner of impeachment and removals, as authorized by said section 11,

Honorable Edward V. Long

it could not resolve itself into a court of impeachment. It is a sufficient answer to this to say that by the provisions of said section 11 is conferred the power to remove all elective officers for cause, and yet, while there are no means or measures whereby removals may be accomplished as therein provided, or by any ordinance passed in pursuance thereof, yet the grant of power by the section carried with it all necessary incidental powers, without which the grant would be ineffectual. The general rule is that where a grant of power is given, all the means necessary to effectuate the power pass as incidents to the grant. State v. Walbridge, 119 Mo. 383; Ex parte Marmaduke, 91 Mo. loc. cit. 262; Sutherland on Stat. Const., sec. 391; Beach on Public Corporations, sec. 1314.

"Here where the power of removal for cause is conferred and no notice is required to be given to the officer proceeded against, the law will imply that such notice be given. Laughlin v. Fairbanks, 8 Mo. 370; Wickham v. Page, 49 Mo. 526; Brown v. Weatherby, 71 Mo. 152. And what the law will imply is as much a part and parcel of a legislative enactment as though set forth in terms. State v. Board, 108 Mo. 235; Sutherland on Stat. Const., sec. 334. Therefore the section of the statute conferring the power of removal for cause needs no ordinance to render it operative--the means to effectuate the power conferred passed as a necessary incident. It is a self-executing statute in this respect."

Therefore, in view of the above, the instant city marshal may be removed under the provisions of Section 77.340, supra, as the provisions of this Section are self-executing and no ordinance is necessary to permit their operation.

There remains, however, Section 85.600, RSMo 1949, to be considered and its operation with regard to Section 77.340

Honorable Edward V. Long

determined. Section 85.600 is included among those city police provisions applicable to cities of the third class and reads as follows:

"The council shall, by ordinance, provide for the removal of any marshal, assistant marshal or policeman guilty of misbehavior in office."

It might be urged that this section is mandatory and that the instant marshal may not be removed under Section 77.340, supra. A somewhat similar situation arose with regard to the city charter of the City of Grand Rapids in the case of *Hawkins v. Common Council of City of Grand Rapids*, 158 N.W. 953, 192 Mich. 276, wherein section 11, tit. 2, of the charter provided for removal of elective or appointive officers by the common council upon giving of notice, setting of a hearing and an affirmative vote of two-thirds of all aldermen elected. The court stated at l.c. 957:

"Under title 3 of the Grand Rapids Charter, entitled 'Powers and Duties of the Common Council,' power is given to legislate for various purposes, amongst which is:

'Sec. 11. To provide for and regulate the election and appointment of all officers and for their removal from office, and the filling of vacancies.'

"It is urged this was a mandatory prerequisite to exercising the power, and, because the council had not passed a guiding ordinance or otherwise provided by legislation any regulations or course of procedure for removal from office, this hearing was a nullity. Having been given in general terms, under title 2 of the charter, a limited power of removal for cause, the language used in title 3 seems to suggest a legislative intent that before exercising such power the council would prescribe rules, or regulate by some preadopted method the manner in which it would be administered. Considerations of

Honorable Edward V. Long

fairness, certainty, and convenience suggest the wisdom of such a course before assuming to exercise the power. The language of the charter appears to be in its nature permissive and directory rather than imperative.

"It was said in *State v. Walbridge*, 119 Mo. 383, 24 S.W. 457, 41 Am. St. Rep. 663:

'It is true that neither charter nor ordinance make any provision for the means whereby the motion of an appointive officer is to be effected; but, where a grant of power is given, all the means necessary to effectuate the power pass as incidents of the grant.'

"While this omission may be an element entering into consideration of what was done, we cannot say that it ipso facto nullified the action of the council because in direct violation of a mandatory provision.* * *

With regard to the marshal in the instant case, we feel that the provision of Section 85.600, supra, is not mandatory and failure to enact an ordinance as there provided will not prevent the removal of said officer under the provisions of Section 77.340, supra.

Furthermore, we feel that even had there been enacted proper ordinances pursuant to the authority of Section 85.600, with regard to the marshal such mode of removal would be considered merely cumulative. In the case of *State ex rel. v. Walbridge*, 119 Mo. 383, 24 S.W. 457, it was urged that Section 7127 et seq., Revised Statutes, 1889, which provided for forfeiture and removal from office upon filing of complaint by prosecuting attorney of all elective and appointive officers, except those subject to impeachment, for failure to personally devote their time to the performance of their duties, provided an exclusive remedy. The court however stated at l.c. 388 that:

"In *Manker v. Faulhaber*, 94 Mo. 430, action was brought against the mayor and others for damage for maliciously removing the

Honorable Edward V. Long

plaintiff from the office of city collector, in November, 1878. The defendants justified under the amended charter of that city, approved March, 1875, which contained this provision: 'The mayor * * * shall have power, with the consent of the board of aldermen, to remove from office any person holding office created by charter or ordinance, for cause, and on application of three-fourths of the board of aldermen he shall be compelled to remove any officer created by ordinance.' The trial court refused to permit that section of the charter to be read in evidence, and instructed the jury that, under the constitution and laws of Missouri, as they existed in November, 1878, the mayor and board of aldermen of the city of Sedalia had no legal right or authority to remove the plaintiff from the office of city collector. This action of the trial court was held erroneous; that the charter of Sedalia was unaffected by the act of 1877; that the charter not conferring on the mayor and aldermen the power to remove a municipal officer, was special and particular, while the act of 1877 was general and affirmative, without repealing words; that the two acts were not irreconcilably inconsistent, and, therefore, there was no repeal by implication.

"That ruling can not be otherwise regarded than as decisive of this case; since the charter of St. Louis of 1876 is no more inconsistent with the general law of 1877 than was the charter of Sedalia on the point already quoted. Manker v. Faulhaber, has been approvingly cited as to repeals by implication in State v. Noland, 111 Mo. loc. cit. 484, and directly followed in State ex rel. v. Slover, 113 Mo. 202, where it was distinctly ruled that section 8233, Revised Statutes, 1889, providing that an official stenographer might be removed without the intervention of a jury, for 'incompetency or any misconduct in office,' by the judge of the circuit court, on charges entered of record, and notice given, could stand as consistent with section 7127, aforesaid, and

Honorable Edward V. Long

that the provisions of section 8233 might well be regarded as simply furnishing a cumulative remedy to that ordained in the former section, in relation to removals for failure to give personal attention to official duties."

We therefore feel that the presence of Section 85.600, supra, does not prevent the removal of the marshal in this case under the provisions of Section 77.340, as any proper mode of removal which would be provided by ordinance under authority of Section 85.600 would simply furnish a cumulative remedy.

CONCLUSION

It is therefore the opinion of this department that the marshal, an elective official, of a city of the third class may be removed from office under the provisions of Section 77.340, RSMo 1949, even though no ordinance providing for such removal has been passed by said city.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

Approved:

J. E. TAYLOR
Attorney General

RHV:ba

DEPUTY SHERIFFS:
DEPUTY CIRCUIT CLERKS:
COUNTY BUDGET LAW:



(1) A circuit judge has the power, at any time, to make an order increasing the salary of a deputy sheriff and/or a deputy circuit clerk; (2) A county court is obligated to pay salary increases of deputy sheriffs and/or deputy circuit clerks ordered by a circuit judge; (3) A county court is obligated to issue warrants covering such salary increases even though there is not money immediately available for such purpose; (4) Warrants issued to deputy sheriffs and/or deputy circuit clerks will be protested if there are no funds available with which to pay them; (5) A county court would not be justified in refusing to pay a salary increase ordered by a circuit judge; (6) A circuit judge may not make an order for a salary increase of a deputy circuit clerk which is retroactive.

November 15, 1951

Honorable Edgar Mayfield
Prosecuting Attorney
Laclede County
Lebanon, Missouri

11-16-51

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

"On behalf of the Laclede County Court, I would like to request an opinion from your office on the following proposition:

"At the beginning of 1951, our sheriff and circuit clerk each had one full time deputy, and when the county budget was made up for the year, the salary of the deputy sheriff was \$150.00 per month and the salary of the deputy clerk was \$110.00 per month. These respective salaries had been previously fixed by order of the Circuit Court.

"On September 29, 1951, the Circuit Court made two orders which were duly filed in the office of the county clerk. One order raised the salary of the deputy sheriff from \$150.00 per month to \$185.00 per month, to be effective as of October 1, 1951. The other order

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raised the salary of the deputy circuit clerk from \$110.00 per month to \$125.00 per month, to be effective as of September 1. Under this state of facts, the deputy sheriff would not be subject to drawing the increase in salary until the last of October, but the deputy clerk would be entitled to her increase as of the last of September. The Court, in making these orders, was acting under the authority of Sections 57.230, 57.250 and 483.345, 483.350, Revised Statutes of Missouri, 1949.

"When the last of September arrived, the county court refused to approve a voucher for the deputy clerk in the amount of \$125.00, and refused to pay her the increase in salary, but offered to pay her her original salary of \$110.00. Further, the county court indicates that it does not think that the court is legally required to pay either of said salary increases. The court feels that since these increases were not included in the budget estimates filed at the beginning of 1951 in accordance with the provisions of the County Budget Law, Section 50.670 to Section 50.740, Revised Statutes of Missouri, 1949. One question that we have, then, is how is the authority which is given the Circuit Court in Sections 57.230, 57.250, 483.345, and 483.350, with reference to the salaries and compensation of deputy sheriffs and circuit clerks, reconciled with the provisions of the County Budget Law, supra?

"If the authority of the Circuit Court is paramount and the county court is required to pay these increases as ordered, will it still have to pay the increase for the deputy clerk for the month of September, 1951, in view of the fact that the order was not made until September 29, 1951?

"Furthermore, the county court wanted to know whether it would have to pay these salary increases if it didn't have enough money to do so.

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I take this to mean, that the county court feels that on the basis of past experience with expenditures, the present rate of expenditure will use up all available funds by the end of the year. In this respect I wish to point out that the county is solvent and there is a balance on hand in the general current fund at the present time. Does the court have to go ahead and pay these increases in salaries as long as there is money in the county treasury with which to pay them? If all funds are used up before the end of the year, will not all warrants then outstanding be pro-rated or else protested, including the warrants given to the deputy sheriff and deputy clerk? Upon what basis, if any, would the county court be justified in refusing to pay these salary increases as ordered by the Circuit Court?"

We will here take note of the fact that Laclede County is a county of the third class.

We will consider first the case of the deputy sheriff. In this connection we desire to direct your attention to Section 57.250, RSMo 1949, which states:

"The sheriff in counties of the third and fourth classes shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the judge of the circuit court, as such judge shall deem necessary for the prompt and proper discharge of his duties relative to the enforcement of the criminal law of this state. The judge of the circuit court, in his order permitting the sheriff to appoint deputies or assistants, shall fix the compensation of such deputies or assistants. The circuit judge shall annually, and oftener if necessary, review his order fixing the number and compensation of the deputies and assistants and in setting such number and compensation shall have due regard for the financial condition of the county. Each such order shall be entered of record and a certified copy thereof shall be filed

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in the office of the county clerk. The sheriff may at any time discharge any deputy or assistant and may regulate the time of his or her employment."

In an opinion rendered by this department on January 14, 1948, to Honorable Leo Harned, Prosecuting Attorney of Pettis County, Missouri, (a copy of which opinion is enclosed) this department construed what is now Section 57.250, supra, to mean that in counties of the third class the circuit judge had the authority to change the compensation of deputy sheriffs at any time. This, it would appear, is the clear meaning of Section 57.250, quoted above.

We have carefully studied sections 50.670 through 50.740, inclusive, RSMo 1949, to which sections you have directed our attention. We do not find any conflict between the above sections and Section 57.250, quoted above. We note that Sections 50.670 through 50.740, inclusive, require the county court of each county, at the regular February term of such court, to prepare and file a budget of estimated receipts and expenditures, and that every county officer is required, not later than January 15, to furnish to the county clerk an itemized statement of the estimated amount required for the payment of all salaries for the current year. It is obvious, of course, that an increase in the salary of a deputy sheriff ordered by a circuit judge in September could not actually have been budgeted the previous February. We do believe, however, that such an increase is automatically included in the budget which was prepared in February. We have so held in an opinion issued on July 18, 1949, to Honorable Joe C. Welborn, Prosecuting Attorney of Stoddard County, a copy of which opinion is enclosed. This opinion holds: "An increase in salaries of prosecuting attorneys, effective July 7, 1949, is automatically included in the budget for the year 1949."

You will note after reading the above opinion issued by this office, that it is based entirely upon the case of Gill vs. Buchanan County, 142 S.W. (2d) 665. As we pointed out in the opinion to Welborn, the fact situation in the Gill case was not entirely similar to that in the Welborn case inasmuch as in the Gill case, the compensation of the county officer involved was fixed at the time the county budget was made but was not entirely included in the budget, whereas in the Welborn case the increase in the salary of the county officer involved was contained in a legislative act which did not become effective until July 7, subsequent to the fixing of the county

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budget the previous February. Nor is the instant case exactly similar to either the Gill case or the Welborn case. Here the increase is ordered by the circuit judge in September subsequent to the fixing of the county budget the previous February. In this connection, we would here direct your attention to the following portion of the opinion in the Gill case (l.c. 668):

"Defendant also contends that plaintiff is not entitled to recover because there was not a sufficient amount provided in the 1934 county budget for county court salaries to pay salaries of \$4,500 each. (Only \$840 more than the total of salaries figured at \$3,000 each was included in the salary fund for the county court.) However, as hereinabove noted, salaries of county judges are fixed by the Legislature and the Constitution prevents even the Legislature from changing them during the terms for which they were elected. Surely, the county court cannot change them, by either inadvertently or intentionally providing greater or less amounts in the salary fund in the budget. The action of the Legislature in fixing salaries of county officers is in effect a direction to the county court to include the necessary amounts in the budget. Such statutes are not in conflict with the County Budget Law but must be read and considered with it in construing it. They amount to a mandate to the County Court to budget such amounts. Surely no mere failure to recognize in the budget this annual obligation of the county to pay such salaries could set aside this legislative mandate and prevent the creation of this obligation imposed by proper authority. Certainly such obligations imposed by the Legislature were intended to have priority over other items as to which the county court had discretion to determine whether or not obligations concerning them should be incurred. They must be considered to be in the budget every year because the Legislature has put them in and only the Legislature can take them out or take out any part of these amounts. This court has held that the purpose of the County Budget Law was 'to compel * * * county courts to

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comply with the constitutional provision, section 12, art. 10' by providing 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.' Traub v. Buchanan County, 341 Mo. 727, 108 S.W. 2d 340, 342.

"To properly accomplish that purpose, mandatory obligations imposed by the Legislature and other essential charges should be first budgeted, and then any balance may be appropriated for other purposes as to which there is discretionary power. Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey, cannot bar the right to be paid the balance. Instead, it must be the discretionary obligations incurred for other purposes which are invalid, rather than the mandatory obligation imposed by the same authority which imposed the budget requirements. We, therefore, hold that a county court's failure to budget the proper amounts necessary to pay in full all county officers' salaries fixed by the Legislature, does not affect the county's obligation to pay them."

The holding above is that the Legislature has the right to fix the salaries of county officers and that the county court must include such salaries, in full, in the county budget. In the instant case, the Legislature did not itself fix the salaries of deputy sheriffs, but it did delegate to circuit judges power to fix such salaries. That the Legislature had the right and power to make such a delegation of authority does not appear to be questioned and, as we stated above, this department by the opinion referred to, a copy of which is enclosed, has held that the circuit judge does have such authority. Our position in the instant case is that the act of the Legislature delegating to a circuit judge the power to fix the salary of a deputy sheriff is, after the circuit judge fixed the salary, the same thing as if the Legislature itself had fixed the salary, in which event the salary would be automatically included in the county budget even though, as we held in the Welborn case, the salary increase did not

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become effective until July following the fixing of the budget the previous February. If this were not true, then the Legislative act increasing the salary of a county official effective as of July 7, in the Welborn case, would be a nullity, and the increase in salary of the deputy sheriff in the instant case would likewise be a nullity, neither of which could have been the intention of the Legislature.

If we are correct in holding, as we do above, that the salary increase of the deputy sheriff ordered by the circuit judge in September is automatically included in the county budget for that year, then in answer to your first question, we reply that there is no need to reconcile Sections 57.230 and 57.250, RSMo 1949, with Sections 50.670 through 50.740, inclusive, RSMo 1949, because there is no conflict.

Your next question, so far as it relates to deputy sheriffs, is: "Does the county court have to pay this salary increase if it does not have enough money to do so?"

Upon the basis of our holding above that the increase in the salary of the deputy sheriff is automatically included in the county budget for the year in which the increase is made, we direct your attention to the following portion of the opinion in the Gill case, *supra*, l.c. 668:

"Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey, cannot bar the right to be paid the balance. Instead it must be the discretionary obligations incurred for other purposes which are invalid, rather than the mandatory obligation imposed by the same authority which imposed the budget requirements. We, therefore, hold that a county court's failure to budget the proper amounts necessary to pay in full all county officers' salaries fixed by the Legislature, does not affect the county's obligation to pay them."

We believe that the increase in the salary of the deputy sheriff would be payable out of Class 4 of the county budget. Class 4 of Section 50.710, RSMo 1949, states:

"Pay or salaries of officers and office expense. List each office separately

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and the deputy hire separately. (County clerk shall prepare estimate for the county court but his failure does not excuse the court.)"

Payment out of Class 4 would appear to be proper since the salary of the deputy sheriff is automatically budgeted and is payment of the salary of a county officer. Enclosed is a copy of an opinion rendered by this department on August 28, 1951, to Honorable W. H. Holmes, State Auditor, which opinion affirms this holding. If no funds are available in Class 4 for this purpose, then we believe that funds should be transferred to Class 4 from Class 5, if there are funds in Class 5, and if there are no funds in Class 5 and if there are funds in Class 6, then such funds in Class 6 should be transferred to Class 4. This is indicated by the last quoted portion of the opinion in the Gill case which holds that discretionary obligations (which are those in Classes 5 and 6) must give way to the "mandatory obligation" to pay the salaries of county officers. We understand from your letter that the county has funds, either in Class 5 and/or 6 or funds which are not budgeted, which can be placed in Class 4, since you state that: "The county is solvent and there is a balance on hand in the general current fund at this time."

Your third question is: "Does the county court have to go ahead and pay this increase in salary as long as there is money in the county treasury with which to pay it?"

We believe that the answer to this question is in the affirmative, for the reasons given above in answer to your second question.

Your fourth question is: "If all funds are used up before the end of the year, will not all warrants then outstanding be pro-rated or else protested, including the warrants given to the deputy sheriff?"

In answer to the above question, we again call attention to the last above quoted portion of the Gill case, which states: "Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey, cannot bar the right to be paid the balance." Also: "We, therefore, hold that a county court's failure to budget the proper amounts necessary to pay in full all county officers all salaries fixed by the Legislature, does not affect the county's obligation to pay them."

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Certainly, if the county court issued a warrant for the full salary of the deputy sheriff and there were no funds with which to pay the warrant, or not funds enough to pay it in full, payment would be refused by the county treasurer. Section 50.210, RSMo 1949, states:

"No county treasurer in this state shall pay any warrant drawn on him unless such warrant be presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator; and when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same."

Your fifth question is: "Upon what basis, if any, would the county court be justified in refusing to pay the salary increase to the deputy sheriff as ordered by the circuit court?"

Section 57.250, RSMo 1949, in part, states:

"* * * The circuit judge shall annually, and oftener if necessary, review his order fixing the number and compensation of the deputies and assistants and in setting such number and compensation shall have due regard for the financial condition of the county.* * *"

(Underscoring ours.)

The above is the only limitation imposed upon a circuit judge in the matter of fixing the number and compensation of deputy sheriffs, if indeed the above could be termed a limitation. If it is a limitation, it is not one which could be invoked by the county court. It would seem to us that there would never be any basis upon which the county court would be justified in refusing to pay the salary increase of a deputy sheriff ordered by the circuit judge.

We would now direct your attention to the situation of the deputy circuit clerk. You state that on September 29, 1951, the circuit judge ordered the salary of the deputy circuit clerk raised from \$110 per month to \$125 per month, to be effective as of September 1st. Section 483.345, RSMo 1949, provides for the appointment of deputy circuit clerks and their compensation. That section states:

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"Every circuit clerk in counties of the third class shall be entitled to such number of deputies and assistants to be appointed by such official with the approval of the judge of the circuit court, as such judge shall deem necessary for the prompt and proper discharge of the duties of his office. The judge of the circuit court, in his order permitting the circuit clerk to appoint deputies or assistants, shall fix the compensation of such deputies or assistants which order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered on record, and a certified copy thereof shall be filed in the office of the county clerk. The circuit clerk may, at any time discharge any deputy or assistant, and may regulate the time of his or her employment and the circuit court may at any time modify or rescind its order permitting an appointment to be made."

It appears clear to us from the language of the above section that deputy circuit clerks may be appointed by the circuit clerk at any time during his term of office, with the approval of the circuit judge, and that their salary is to be fixed by the circuit judge at the time of their appointment. The question which we have to answer here is whether, when a deputy circuit clerk has been appointed under the conditions set forth above, a circuit judge may subsequently order an increase in the salary of the deputy circuit clerk.

Although the above section might well be more clear regarding the power of the circuit judge to increase the salary of a deputy circuit clerk subsequent to his appointment, we believe that the above section, which allows the circuit judge at any time to modify or rescind its order permitting the appointment of deputy circuit clerks and fixing their compensation, does give to the circuit judge the power to change the compensation of such deputy circuit clerks subsequent to their appointments. It would appear that the power to modify such order would include the power to change the number of such deputy circuit clerks or the amount of their compensation. It would be unreasonable to suppose that the circuit court could not modify the order as to

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compensation when the order could be rescinded in its entirety and a new order made allowing the appointment of deputies and fixing a different compensation.

In regard to deputy circuit clerks, you next ask us whether a circuit judge has the authority on September 29 to make an order raising the salary of a deputy circuit clerk to be effective as of September 1st.

In regard to the above, we would direct your attention to Article III, Section 39 of the Constitution of Missouri, 1945, the parts of which, pertinent to this matter, state:

"Sec. 39. Limitations on Power of Assembly.-
The general assembly shall not have power:

* * * *

"(3) Extra Compensation to Public Employees or Contractors.- To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part;"

In view of paragraph (3), quoted above, we do not believe that a circuit judge could by an order on September 29, make an order increasing the salary of a deputy circuit clerk as of September 1st, but that such order for an increase in such salary would become effective as of the day upon which such order was issued.

CONCLUSION

It is the opinion of this department that:

(1) A circuit judge has the power, at any time, to make an order increasing the salary of a deputy sheriff and/or a deputy circuit clerk.

(2) A county court is obligated to pay salary increases of deputy sheriffs and/or deputy circuit clerks ordered by a circuit judge.

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(3) A county court is obligated to issue warrants covering such salary increases even though there is not money immediately available for such purpose.

(4) Warrants issued to deputy sheriffs and/or deputy circuit clerks will be protested if there are no funds available with which to pay them.

(5) A county court would not be justified in refusing to pay a salary increase ordered by a circuit judge.

(6) A circuit judge may not make an order for a salary increase of a deputy circuit clerk which is retroactive.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

Enclosures (3).

HPWab

TAXATION: INTANGIBLE
PERSONAL PROPERTY:

Postal Savings accounts not obligations of United States; not exempt from state taxation under Section 742, Title 31, U. S. C. A. Ownership or beneficial interest of such an account taxable as intangible personal property, classified as "money on deposit," and tax to be measured by yield or income of account under Section 146.010, RSMo 1949.

July 11, 1951

Honorable Eugene L. McGee
Judge of Probate Court
Butler County
Poplar Bluff, Missouri



Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads as follows:

"Section 146.070 R. S. of Mo 1949 provides that no estate of a deceased person in which there is intangible personal property subject to intangible personal property tax shall be closed without the payment of the tax.

"Decedent died owning the maximum amount of U. S. postal savings certificates, on which interest had not been paid for several years, dating back prior to the time this intangible personal property tax became a law. The executrix of the estate in order to close the estate and make distribution must cash these postal savings certificates and collect the accrued interest, and has taken the proper steps to obtain payment for the estate the amount of the certificates plus the accrued interest.

"We would like to know if interest on U. S. Postal Savings certificates is subject to the intangible personal property tax, and, in this particular instance, if the interest which had accrued prior to the effective date of the in-

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tangible tax law, but just now being collected, should be included in the tax to be assessed, if there is any to be assessed."

Your inquiry is whether the interest on U. S. Postal Savings Certificates is subject to the intangible personal property tax, and if the interest which had accrued prior to the effective date of the intangible tax law, but just now being collected should be included in the tax to be assessed, if any tax is to be assessed.

The first part of your inquiry, as to the taxability of interest on U. S. Postal Savings Certificates will be the subject matter of our discussion herein, since we believe the latter part of your inquiry is fully answered by the opinion of this department furnished to the Honorable G. H. Bates, Director of Revenue, Jefferson City, Missouri, on January 23, 1950. A copy of that opinion is enclosed for your consideration.

Section 146.010, RSMo 1949, defines the terms "intangible personal property", "person" "taxable situs" and "yield" or "annual yield" insofar as taxes are concerned on this type of property, said section reads as follows:

"1. 'Intangible personal property' means moneys on deposit; bonds, except those which under the constitution or laws of the United States may not be made the subject of a property tax by the state of Missouri; certificates of indebtedness, other than capital notes issued by banks or trust companies; notes; debentures; annuities; accounts receivable; conditional sales contracts, which have incorporated therein promises to pay; and real estate and chattel mortgages.

"2. The term 'person' includes any individual, firm, copartnership, joint adventure, association, corporation, company, estate, trust, business trust, syndicate, executor, administrator, receiver or trustee appointed by the state or federal court, or any other group or combination acting as a unit.

"3. The 'taxable situs' of intangible personal property for the purpose of this chapter, for residents of Missouri, shall be the residence of the owner thereof. If any law shall provide

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for the payment of the intangible property tax at its source the taxable situs shall be the location of the business owning or administering the intangible property. All intangible property of persons residing in other states used in or arising out of business transacted in this state, by, for or on behalf of such nonresident shall be taxed on the annual yield thereof, and the taxable situs shall be the location of the business. All intangible personal property of persons residing in this state but used in or arising out of business transacted outside of this state by, for or on behalf of such persons and taxed in such other state shall not be subject to the intangible property tax in this state. Intangible personal property in the hands of an executor or an administrator shall be subject to the intangible tax at the residence of the decedent at the time of death.

"4. The term 'yield' or 'annual yield' means the aggregate proceeds received as a result of ownership or beneficial interest in intangible property whether received in money, credits or property, exclusive of any return of capital, and less the amount of interest required to be credited by the owner thereof, during the preceding calendar year, to reserve liabilities of the owner maintained under the statutes of this state."

Only certain kinds of property have been specifically mentioned in paragraph 1 of above quoted section. As we understand the effect of the statute, only property specifically named, or property falling within the classifications provided therein is taxable. If the interest on a postal savings account is taxable as intangible personal property, it is because it falls within one of the classes of property mentioned by above quoted section, since such interest has not been specifically named.

In order to determine whether such property may be so classified, it is necessary that we consider the nature of the certificates, and the purpose for which they are issued as well as the law regulating same.

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The original "Postal Savings Bank Act", creating Postal Savings Depositories, was passed by an act of the 61st Congress of the United States on June 25, 1910.

The purpose of the act is found in the heading of Chapter 386, Public Laws, page 814, Vol. 36, and reads as follows:

"An Act To establish postal savings depositories for the depositing of savings at interest with the security of the government for repayment thereof, and for other purposes."

While there have been various amendments to this law from time to time, it appears that the original purpose of the act which appears to have been for the encouragement of savings accounts among citizens of our country, and particularly among the lower income groups, has never been changed. It is not our purpose to enter into a long detailed discussion of the purpose of the law, or to quote long passages from same, but we find it both necessary and proper for our purpose to notice some of the characteristics of postal savings under the federal law. The present statutes on this subject are found under Title 39, Chapter 20, U. S. C. A.

The general scheme of postal savings is the establishment of depositories under authority of a Board of trustees consisting of the Postmaster General, Secretary of the Treasury and Attorney General, which has power to make all necessary and proper regulations for the receipt, transmittal, custody, deposit, investment, and repayment of the funds deposited at postal savings depository offices.

Deposits may be made at any of the depository offices in the sum of \$1.00 or multiples thereof, and each deposit of 10 cents is evidenced by a stamp to be attached to a card furnished for that purpose, and a card with ten stamps affixed will be accepted as a deposit of \$1.00 or may be redeemed in cash. Interest at the rate of two per-cent a year is paid, but not on fractions of one dollar, and no balance shall exceed \$2500.00.

Deposits may be withdrawn in whole or in part, on demand, and are redeemable in money, or upon surrender, and in lieu of the face value of the certificates, the depositor may, at his option, receive certain United States government bonds, which are exempt from both state and federal taxes of every kind.

From the various provisions of the federal statutes relating to postal savings, it appears that the relationship commonly re-

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cognized as existing between a bank and its depositor, is created between a postal savings certificate purchaser and the depository office of the postal savings, from which the certificates were purchased.

The original transaction between such purchaser and the depository office has been referred to in Section 754, Title 39, U. S. C. A., as "opening an account." While the amount payed by the purchaser for the certificates is referred to as "deposited" with the depository office. Sections 755 and 757, respectively, provided for the payment of interest to such "depositor", and that "any depositor may withdraw the whole or any part of the funds deposited to his or her credit with accrued interest," in a postal savings "account" is so very similar to an ordinary savings account deposit in a bank as to be almost indistinguishable from it, and might properly be classified as "money on deposit," within the meaning of Section 146.010, supra. However, the mere classification as such, would not of itself be sufficient authority to subject postal savings deposits, or the accrued interest thereon to the tax, since such accounts appear to be obligations of the United States government, and the taxability or non-taxability of them must depend upon provisions of the federal law, which of course, are paramount to the taxing statutes of any state.

Ordinarily, bonds, or other obligations of the federal government are exempt from the state or other taxes, under the provisions of Section 742, Title 31, U. S. C. A., which reads as follows:

"Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

In the case of Leka Admx., v. United States, 69 Court of Claims Reports, 89, an administratrix sued the United States Government in the Court of Claims to recover the total amount of deposits, and accrued interest on funds placed in a postal savings account by the decedent. In its opinion the court reviewed the theory of postal savings accounts under the federal statutes, and denied the claim for the reason that postal savings deposits, in effect are trust funds of the depositors, and since the money never passed into the treasury of the United States, it is not a debt or obligation of the United States. At l. c. 87, the court said:

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"Before passing to a discussion of the regulations promulgated by the board of trustees to effectuate the purposes enumerated, it may be well to pause here and note that there was created by this act a trust with named trustees, the deposits to be held as trust funds and to be held within the State or community where the deposit was made, and the withdrawals or repayments to be made at the place of deposit and from deposits within the State or community. Interest was to be paid on the deposits, and as provided in the act interest was collected from the banks on the deposits held by them. No part of the fund, it will be observed, went into the Treasury of the United States or became the property of the United States. It was held in trust separate and apart from the funds of the Government. Such being the case the Secretary of the Treasury has no fund out of which to pay the judgment of this court, as it is not payable out of any Government funds. The debt due on this deposit is not a liability of the United States payable out of its funds. It is payable out of the funds in the hands of the trustees, namely, the funds deposited under the postal savings system, and such regulations as they had promulgated as to withdrawals and conditions of payment.

"While the act contained the following provision:

'That the faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices, with accrued interest thereon, as herein provided,'

this clearly means that the faith of the United States is pledged to make good any deficiency in case there is a deficiency in the funds; but this does not mean that the United States can be sued by one of the depositors where there is no question about there being sufficient funds on deposit to meet the claim. The United States has nowhere in this act provided for a suit against it or consented to be sued. We might stop here with the conclusion that this court has not judicial power to give judgment.

The contract involved is not with the United States. It is a contract providing that the depositor is to be paid out of the funds deposited under the postal saving system, and the act itself and the regulations promulgated in pursuance thereof are written into and became a part of the contract. Under the regulations the money received was deposited to the credit of the board of trustees. * * * The checks and drafts for payment were drawn against this account of the board of trustees. "

(Underscoring ours.)

In view of the holding in above cited case it is our thought that postal savings accounts or accrued interest thereon are not obligations of the United States within the meaning of Section 742 U. S. C. A., supra, and are not exempt from taxation under state, municipal or local authority; that for reasons given above such accounts are intangible personal property to be classified as "money on deposit" under the provisions of paragraph 1, Section 146.010, supra, for tax purposes.

In this connection we call attention to the theory of the intangible personal property tax law which is that the tax is to be levied upon the ownership, or beneficial interest of such property, and that such tax is to be measured by the annual yield, or income producing ability of the property.

It appears that the postal savings account referred to in the opinion request, and the accrued interest thereon, were the property of the deceased at the time of his death, as evidenced by postal savings certificates of said account, issued in his name. Such account, and accrued interest being (intangible) personal property of the estate shall be distributed along with other estate property to those who may be entitled to receive same under the will of deceased when the administration of his estate has been finally closed.

While the interest on the savings account has been allowed to accumulate for years, and only recently has been collected (presumably by the executrix) this will not be of any consequence insofar as the payment of the tax is concerned.

It is our further thought that the tax is due from the estate of deceased, because of his ownership of the account, and that since such property was "money on deposit" within the meaning of Section

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146.010, supra, the tax must be measured by the yield, or the amount of interest which had accrued upon the account each year.


CONCLUSION

It is the opinion of this department that money on deposit in a postal savings account and accrued interest thereon, is not an obligation of the United States within the meaning of Section 742, Title 31, U. S. C. A., and is not exempt from taxation under state, municipal, or local authority. That under provisions of Missouri statutes quoted above, postal savings accounts are intangible personal property, and for taxation purposes may be classified as "money on deposit." That since the tax is upon the ownership or beneficial interest of intangible personal property, the estate of one who owned a postal savings account at the time of the owner's death, is liable for the payment of the tax which is to be measured by the annual yield or income from such account.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

PNC:hr

CORONERS:

The compensation of coroners in second class counties is confined exclusively to the annual salary of \$2,000.00 fixed by Section 58.090, RSMo 1949.

March 8, 1951

3-14-51

Honorable Ivella McWhorter
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri

FILED

59

Dear Miss McWhorter:

This will be the opinion you requested from this department in which you ask if a coroner who is a physician and surgeon in a county of the second class may receive any additional fees beyond the \$2,000.00 salary fixed for such officer in Section 58.090, RSMo 1949, (Section 1, Laws of Missouri, 1945, page 1560), (Section 13259, R.S.Mo. 1939, as amended). Your letter is as follows:

"The question has arisen whether or not a coroner who is a physician and surgeon in a county of the second class, should receive any additional fees beyond the \$2000 set by statute under Section 13259.1, R.S. of Missouri, 1939, as amended. The section reads, 'The aforesaid salary shall be paid in lieu of all fees, charges, emoluments, and money due to, or receivable by the coroner, by virtue of any statute, for services rendered.'

"It will be noted that under Section 13257, R.S. of Missouri, 1939, that a coroner, if he is himself a physician and surgeon, and as coroner conducts a post mortem examination, that he shall be granted an additional fee, not exceeding \$25.00. This section was not repealed and there is now some controversy whether or not the coroner here in Greene County can receive an additional \$25.00 for each post mortem examination under Section 13257, supra, when section 13259.1 reads as it does as to fees, charges, emoluments, and money due to, or receivable by the coroner, by virtue of any statute, for services rendered.

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"And further, would the other statutes relating to fees payable to coroners and not designating the class of county apply to a coroner of a county of the second class, so that there would be other additional fees which could be payable to such coroner."

Your letter submits specially:

1) If the coroner conducts a post mortem examination is he entitled to an additional fee of \$25.00 for each post mortem examination under Section 13257, R.S. Mo. 1939, now Section 58.530, RSMo 1949, and

2) Would other statutes relating to fees payable to coroners and not designating the class of county, apply to a coroner of a county of the second class so that other additional fees may be payable to such coroner.

The third paragraph of Section 48.020, RSMo 1949, defining counties of the second class, reads as follows:

"Class 2. All counties now having or which may hereafter have an assessed valuation of fifty million dollars and less than three hundred million dollars shall be in the second class."

The official manual of the State of Missouri, popularly known as the "Blue Book", page 747, states that Greene County, Missouri, at the time of the compilation and publication of said manual had an assessed valuation of property at \$69,065,928 and a population of 90,541, such county would, therefore, by reason of the assessed valuation thereof be established by the terms of paragraph 3 of Section 48.020, supra, as a second class county.

Section 58.090, RSMo 1949, (Section 1, page 1560, Laws of Missouri, 1945), (Section 13259.1, R.S. Mo. 1939, as amended), reads as follows:

"In all counties of the second class, the coroner shall receive an annual salary of two thousand dollars for his services, to be paid by the county, in twelve equal monthly installments, by warrants drawn on the county treasury. The aforesaid salary shall be paid in lieu of all fees, charges, emoluments, and money due to, or receivable by the coroner, by virtue of any statute, for services rendered."

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Section 58.520, RSMo 1949 (Section 13424, R.S. Mo. 1939) reads as follows:

"Coroners shall be allowed fees for their services as follows; provided that when persons come to their death at the same time or by the same casualty, fees shall only be paid as for one examination:

For the view of a dead body	\$5.00
For issuing a warrant summoning each jury of inquest75
For swearing each jury50
For each subpoena for witnesses (all names to be put in one subpoena if possible).....	.25
For taking each recognizance (all names to be put in one recognizance).....	.75
For going from his residence to the place of viewing a dead body and return, each mile08

The above fees, together with the fees allowed jurors, constables and witnesses, in all inquests, shall be paid out of the county treasury as other demands. For performing the duties of sheriff, the coroners shall be entitled to the same fees as are for the time being allowed to sheriffs for the same services."

Section 58.540, RSMo 1949 (Section 13247, R.S. Mo. 1939) reads as follows:

"For taking down the testimony at an inquest, the coroner shall be allowed ten cents for every hundred words, and twenty-five cents for certifying the same."

Section 58.470, RSMo. 1949 (Section 13258, R.S. Mo. 1939) reads as follows:

"Whenever an inquest shall be held, and the coroner shall have good reason to believe that the deceased came to his death by poison administered by the hand of some

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person other than the deceased, he may, at the request of the jury, cause chemical analysis and microscopical examination of the body of the deceased, or any part of it, to be made; and the testimony of medical and chemical experts may be introduced for the purpose of showing how and in what manner the deceased came to his death; and the coroner shall certify to the county court of his county the fact of such analysis or examination, and testimony of such medical or chemical experts, and that the same was, in his opinion, necessary to an examination into the cause of the death of the deceased; and the court shall allow such fees or compensation for such analysis, examination or medical or chemical testimony of experts as shall be deemed by said court to be just and reasonable."

Section 58.530, RSMo 1949, (Section 13257, R.S. Mo. 1939) reads as follows:

"Whenever the coroner, being himself a physician or surgeon, shall conduct a post-mortem examination of the dead body of a person who came to his death by violence or casualty, and it shall appear to the county court that such examination was necessary to ascertain the cause of such person's death, the county court may allow the coroner therefor an additional fee, not exceeding twenty-five dollars, to be paid as his other fees in views and inquests; but section 58.560 shall not be construed to apply to any such examination when made by the coroner himself."

Section 58.460, RSMo 1949 (Section 13245, R.S. Mo. 1939) reads as follows:

"Whenever an inquest shall be held, if there be no relative or friend of the

Honorable Ivella McWhorter

deceased, nor any person willing to bury the body; nor any person whose duty it is to attend to such burial, the coroner shall procure a cheap, plain coffin, and cause a grave to be dug and the body to be conveyed thereto and buried. It shall be the duty of the coroner, in so doing, to avoid all unnecessary expense, and to render to the court an accurate statement of all money expended by him for such purpose; and the county court shall make to him a reasonable allowance for his actual expenses in procuring the coffin, hauling the body to the grave, digging the grave, and burying the body; and also a reasonable allowance, according to the circumstances, for his own time and services in attending to such preparations and burial."

The sections hereinabove quoted constitute the entire number of sections of our statutes referring to compensation to be paid coroners for their official services.

Section 58.090, supra, is a special statute fixing the salary of coroners in class two counties as a special class of counties.

Said Section 58.090 was a new statute (H.B. 896, Laws of Missouri, 1945, page 1560) enacted by the 63rd General Assembly of this State fixing the salaries of coroners in second class counties after the enactment of the Act classifying counties of this State according to their assessed valuation of property. (Laws of Missouri, 1945, page 1801). It would be difficult, as we view it, to construct language of plainer or clearer meaning than this section provides in saying that "the aforesaid salary shall be paid in lieu of all fees, charges, emoluments and money due to or receivable by the coroner by virtue of any statute, for services rendered."

Sections 58.520, 58.530, 58.540 and 58.460, supra, are other sections which provide in some amounts fees as compensation to be paid to coroners for various services.

Section 58.470, supra, it appears, does not provide that the fees therein mentioned shall be paid to the coroner,

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but provides for the payment of such examination fees or compensation to persons who give testimony as medical and chemical experts from analysis and microscopic examination made of the body, or any part of it, of a person reasonably believed by the coroner to have come to his death by poison administered by the hand of some person other than the deceased. But it might be, if the coroner is a physician himself, that it would be possible for him to make the analysis or examination required, and claim such fees. It is for this reason that we quote and consider the section, lest it be said that, because we did not do so in preparing this opinion, such coroner might be considered as being entitled to fees thereunder as an exception to Section 58.090. We do believe that none of such fees provided for in this section may be claimed by or paid to the coroner.

These sections other than said Section 58.470 relating to fees and compensation to coroners are in direct and irreconcilable conflict with said Section 58.090. Said Section 58.470, would also be in such conflict with Section 58.090, if Section 58.470 should be construed to provide fees for the coroner, or if, thereunder, he should for any reason, claim any part or all of the fees therein mentioned.

Said Section 58.090 does not in express terms repeal said Sections 58.520, 58.530, 58.540, 58.460, all of which sections do provide for fees and compensation to be paid to coroners. But said Section 58.090 provides that the salary of \$2,000.00 to be paid coroners of second class counties "shall be paid in lieu of all fees, charges, emoluments, and money due to, or receivable by the coroner, by virtue of any statutes, for services rendered." (Underscoring ours.) However, since there is an irreconcilable conflict between such other sections and Section 58.090, Section 58.090 does, by implication, as to coroners in class two counties, repeal each and all of said other numbered sections, except said Section 58.470, which section, for the reasons given in the discussion hereinabove of Section 58.470, we believe, does not provide fees for the coroner himself.

There are two ways, it is said, of repealing a statute, one by express terms in a repealing clause of a statute, the other by implication, because of repugnancy between the terms of the new and repealing statute and the terms of a former and repealed statute. Our Supreme Court in the case of City of St. Louis vs. Kellman, 235 Mo. 687, l.c. 694, expressing this rule said:

"* * * There are two ways of repealing an ordinance or statute--one total, where the repeal is by express terms the other (complete) arises by necessary implication where total repugnancy exists between a later and an elder

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ordinance or law; * * * ."

Section 58.090, fixing the salary of coroners in second class counties at \$2,000.00, in lieu of all fees due or receivable by virtue of any statute for their services and the provisions of the group of other numbered statutes granting coroners, generally, other fees and emoluments, cannot stand together. Either the one or the other statutes constituting the group must fall. Section 58.090 was enacted, as will be observed, (Section 1, Laws of Missouri, 1945, page 1560) long after, in period of time, the enactment of each of said conflicting statutes. The repeal by Section 58.090, by reason of its later enactment of such statutes so in conflict therewith and repugnant thereto by implication, as to compensation of coroners in class two counties, is apparent. In the case of State ex rel. vs. Shields, 230 Mo. 91, applying this rule, l.c. 100, our Supreme Court said:

"It is settled doctrine that a subsequent statute necessarily repeals a prior one when there is between them a conflict and repugnancy so clear that the two cannot stand together. * * * ."

Aside from the question of repeal, Section 58.090 deals with the compensation of coroners in a special class of counties--counties of the second class--and in that regard is a special statute, in contradistinction to the general statutes constituting said group of statutes providing other fees for coroners, in conflict with the terms thereof, passed long before the enactment of Section 58.090 and the later statute must prevail over them. In the case of State ex rel. Bates Co. vs. Lee, 303 Mo. 641, the Court was considering two statutes said to be in conflict, one a special statute, the other a general statute. That the special statute must prevail was held by the Court, l.c. 622, the Court saying:

"* * * And if a special provision applicable to a particular object be inconsistent with even a later general law, the special provision will prevail. * * * ."

The Section, 58.090, states that the salary fixed for coroners in second class counties shall be paid "in lieu of" all fees, charges, emoluments and money due to or receivable

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by the coroner. The phrase "in lieu of" means instead of or in place of. Our Supreme Court construed the phrase "in lieu of all other compensation" in the case of Reay vs. Coal Co., 34 S.W. (2d) 1015. The phrase was used in Section 17(a) of the Workmen's Compensation Act, Laws of Missouri, 1927, page 499, where a part of said Section 17(a) provided as follows:

"For permanent partial disability, in lieu of all other compensation, except that provided under section 13 of this act, the employer shall pay to the employee, $66 \frac{2}{3}$ per cent of his average earnings as computed in accordance with section 22, but not less than six dollars nor more than twenty dollars per week, for the periods hereinafter provided."

The Court held that the phrase in the Compensation Act meant precisely what it said, and that it did not permit any other compensation to be paid under Sections 15 or 17(a) of the Act. The Court in construing the phrase, and holding it, as used in said Section 17(a), to exclude payment of all other compensation, l.c. 1016, 1017, said:

"* * * We think there is no doubt but that the language in the 'in lieu' clause appearing in section 17(a) is clear, plain, distinct and unambiguous. When the Legislature plainly and distinctly declares its intention the act is not open to construction and excludes interpretation. * * * ."

The Legislature in the enactment of said Section 58.090 provided not only that the salary of coroners in class two counties should be in lieu of all fees, charges, emoluments, and money due to or receivable by coroners of such counties, but made the exclusion of the receipt of compensation other than the salary fixed by said section as completely clear and emphatic as it would be possible to make language express their intention by further providing that the salary for their services is to be in lieu of such fees, etc. "by virtue of any statute".

The phrase "by virtue of" was construed by our Supreme

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Court as to its meaning and effect in the case of State ex rel. vs. Gass, et al., 296 S.W. 431. The Court in giving its construction of the phrase, l.c. 432, said:

"It is argued that 'the service of a judge as a jury commissioner is not a duty by virtue of the office of circuit judge.' The words 'by virtue,' as used, mean 'because of; through; in pursuance of.' Stroud's Judicial Dictionary; New Standard Dictionary; Webster's New International Dictionary. * * * ."

Confining the right to compensation and the means whereby it is paid to a public officer to statutory authority therein, our Supreme Court in the case of State ex rel. vs. Gordon, 245 Mo. 12, l.c. 28, said the following:

"Not only is the right to compensation dependent upon statute, but the method or particular mode provided by statute must be accepted. On this point the Kansas City Court of Appeals says: 'It seems the general rule in this country, as announced by the decisions and text-writers, that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute. And further, it seems well settled that if the statute provides compensation in a particular mode or manner, then the officer is confined to that manner, and is entitled to no other or further compensation, or to any different mode of securing the same. * * * ."

The case of State ex rel. McGrath vs. Holladay, State Auditor, 67 Mo. 64, was before our Supreme Court on the construction of a constitutional provision which provided that members of the State Board of Equalization should be paid by salaries for the services of such officers in place of fees. The members of the Board were the State Executive Officers. The application of the provision of the Constitution fixing salaries instead of fees for their services prescribed by law

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for them to perform, was challenged, on the ground that, as members of the Board of Equalization, duties were imposed upon them other than the duties connected with their respective office. Holding that the salary fixed by the constitutional provision for their services included the services fixed by law to be performed by them as Members of the Board of Equalization covering all of their services and that it was exclusive of all fees of any other character whatsoever, the Court, l.c. 66, 67, said:

"The meaning of the constitutional provision we take to be, that for any duties imposed upon them as executive officers, they shall receive no compensation except the salary established by law. That the duty of serving as members of the Board of Equalization is imposed upon them respectively as executive officers is clear, if they are not at liberty to decline the performance of that service, and that they cannot is placed beyond controversy by the first section of article five, which requires them respectively to perform such duties as may be prescribed by law. * * *.

* * * * *
It were an easy matter to evade that constitutional provision, if these sections admitted of any other construction than that which we have given them. Additional duties to those now required might be imposed upon them and a compensation allowed exceeding the amounts of their several salaries. The next General Assembly might make them Commissioners of the Permanent Seat of Government, or commissioners to superintend the erection of some public building, and allow them for their services, as such, salaries exceeding those allowed them as executive officers; could the Legislature do this without violating the constitution? If so, the constitutional provision is worthless and without meaning. * * *."

Considering the express terms of Section 58.090, RSMo 1949, and the authorities cited and quoted herein, it appears

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that the coroner in second class counties in this State may not receive any other compensation of any character or under any statute whatsoever except the annual salary of \$2,000.00 provided in said section for his services, and that all other statutes providing other compensation for coroners are, as to coroners in second class counties, impliedly repealed by said Section 58.090, because in irreconcilable conflict therewith.

CONCLUSION.

It is, therefore, the opinion of this department considering the above cited and quoted authorities that:


1) In second class counties in this State the total compensation of coroners for their entire services is fixed at an annual salary of \$2,000.00, and the same is to be in lieu of all fees, charges, emoluments and money due to, or receivable by such coroners in such counties by virtue of any statute for their services rendered;

2) That all other statutes providing other compensation for coroners are, as to coroners in second class counties, impliedly repealed by said Section 58.090, RSMo 1949, because in irreconcilable conflict therewith.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

GWC:ir

SHERIFFS: Motor vehicles owned by the sheriff of a
MOTOR VEHICLES: second class county and used by him and his
deputies exclusively in the transaction of
his official duties, should be assessed
against him personally, after which he is
personally liable for the taxes thereon.

June 22, 1951

Honorable Ivella McWhorter
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri



Dear Miss McWhorter:

This department is in receipt of your recent request for
an official opinion. You thus state your opinion request:

"The question has arisen whether or not
under the following circumstances the
Sheriff of Greene County, which is a
second class county, would be liable for
personal taxes upon the automobiles being
used by his office for county purposes.

"According to the law the Sheriff and his
deputies must furnish their own automobiles
for use in their law enforcement duties and
then will be paid for such use at the rate
of 5¢ a mile which has been raised now to
7¢ a mile. However, in Greene County the
Sheriff has purchased the automobiles being
used by his deputies for law enforcement
purposes and the title to these cars state
Greene County Sheriff's Office, c/o Glenn
Hendrix, Sheriff, which technically puts
the ownership of each automobile in Glenn
Hendrix personally. These automobiles are
used only in carrying out the duties of the
Sheriff's office and are not for personal
use by the Sheriff or his employees.

"Up to this point no license has been re-
quired since the cars have painted on them
that they are cars used by the Greene County
Sheriff's office. It seems, however, that
the County Assessor does not know whether
or not such cars should be included on the
personal tax assessment of Glenn Hendrix,

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Sheriff, since actually the cars do belong to him but are not used by him except for purposes of the Sheriff's office.

"The reason the matter seems to be important is because if a personal tax must be paid on each of these cars then the expense of operation of each automobile will go up to such an extent that it will be almost prohibitive for the Sheriff to continue furnishing such automobiles for use by the County."

You state that in Greene County, the sheriff has purchased the cars used by him and his deputies in the performance of the official duties of the sheriff, and that the ownership of such cars is vested in the sheriff personally. In other words, these cars are the personal property of the sheriff of Greene County. Normally, of course, personal property is assessed and taxes on it are paid by the owner of such personal property. If, where cars are owned by the sheriff and are used only in his official business, the cars are tax exempt; we must be able to point to a statute which creates an exemption. In this connection the Missouri Supreme Court, in the case of *In Re First National Safe Deposit Company*, 173 S.W. 2d 403, 1.c. 405, said:

"It is the general rule that taxing statutes are to be strictly construed in favor of the taxpayer, and against the taxing authority; but this does not extend to exemption provisions of such statutes. The applicable rule in the latter connection is as stated in *State ex rel. St. Louis Y.M.C.A. v. Gehner*, 320 Mo. 1172, 11 S.W. 2d 30, 34: * * * no such exemption can be allowed, except upon clear and unequivocal proof that such release is required by the terms of the statute. If any doubt arises as to the exemption claimed, it must operate most strongly against the party claiming the exemption. * * * "Such statute and constitutional provisions are construed with strictness and most strongly against those claiming the exemption. * * * the burden is on the claimant to establish clearly his

Honorable Ivella McWhorter

right to exemption." * * * See, also State ex rel. Spillers v. Johnston, 214 Mo. 656, 113 S.W. 1083, 21 L.R.A., N.S. 171; 1 Cooley on Taxation, 3d Ed., 357, 358."

Section 137.100, RSMo 1949, lists certain property which shall be tax exempt. That section reads:

"The following subjects shall be exempt from taxation for state, county or local purposes.

"(1) Lands and other property belonging to this state;

"(2) Lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equipments and on public squares and lots kept open for health, use or ornament;

"(3) Lands or lots of ground granted by the United States or this state to any county, city or town, village, or township, for the purpose of education, until disposed of to individuals by sale or lease;

"(4) Nonprofit cemeteries;

"(5) The real estate and tangible personal property which is used exclusively for agricultural or horticultural societies heretofore organized, or which may be hereafter organized in this state;

"(6) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include

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real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational or charitable purposes."

Nothing in the above section could possibly be construed as being applicable in the instant situation.

In this connection the Missouri Supreme Court, in the case of State ex rel. Globe-Democrat Publishing Company v. Frederick Gehner, Assessor, et al., 316 Mo. 694, 1.c. 696, states that:

"The policy of our law, constitutional and statutory, is that no property than that enumerated shall be exempt from taxation.
* * *"

Section 137.075, RSMo 1949, states:

"Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

Since the cars in question are the personal property of the sheriff of Greene County, and since there is no provision in Missouri law which would make them tax exempt, we believe that they should be assessed against the sheriff personally, and that he personally is liable for the taxes thereon.

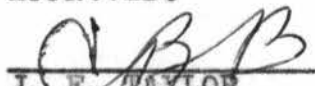
CONCLUSION

It is the opinion of this department that motor vehicles personally owned by the sheriff of Greene County, Missouri, and used exclusively by him and his deputies in the transaction of the official duties of the sheriff, should be assessed against the sheriff personally, after which he is personally liable for the taxes thereon.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

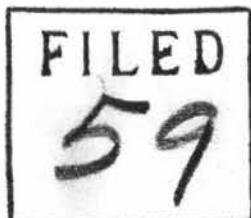
APPROVED:


J. E. TAYLOR
Attorney General

HPWab

WITNESSES,
COMPLAINT,
PRELIMINARY EXAMINATION:

The names of witnesses need not be endorsed upon the complaint used as the basis of a preliminary examination in a felony case.



October 8, 1951

10-9-51

Mr. Roy W. McGhee, Jr.
Prosecuting Attorney
Wayne County
Greenville, Missouri

Dear Mr. McGhee:

We have given careful consideration to your request for an opinion, which request is as follows:

"I would appreciate very much having an opinion on the following question:

"Do Sections 545.240, 545.070, or 545.320, R.S. Mo. 1949, require the endorsement of witnesses' names upon the affidavit or complaint used as the basis of a preliminary examination in a felony case held under Section 544.250, R.S. Mo. 1949?

"The point was unofficially raised today in a preliminary examination on a rape case where I had purposely omitted placing the witnesses' names on the affidavit, deeming it unnecessary. I would appreciate being corrected on the matter if I am in error."

The laws pertaining to the question submitted in your letter are contained in Chapters 544 and 545, RSMo 1949.

Section 545.070 is as follows:

"When an indictment is found by the grand jury, the names of all the

Mr. Roy W. McGhee, Jr.

material witnesses must be endorsed upon the indictment; other witnesses may be subpoenaed or sworn by the state, but no continuance shall be granted to the state on account of the absence of any witness whose name is not thus endorsed on the indictment, unless upon the affidavit of the prosecuting attorney showing good cause for such continuance."

Section 545.240 is as follows:

"Informations may be filed by the prosecuting attorney as informant during term time, or with the clerk in vacation, of the court having jurisdiction of the offense specified therein. All informations shall be signed by the prosecuting attorney and be verified by his oath or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person, which shall be filed with the information; the verification by the prosecuting attorney may be upon information and belief. The names of the witnesses for the prosecution must be endorsed on the information, in like manner and subject to the same restrictions as required in case of indictments."

Section 545.320 is as follows:

"No subpoena for a witness in any criminal case shall be issued on the part of the state, unless the name of such witness be endorsed on the indictment or information, or the prosecuting attorney shall order the same to be issued, in writing, or the prosecutor shall file an affidavit that other witnesses ordered by him are positively necessary for a complete adjudication

Mr. Roy W. McGhee, Jr.

of the case; and no subpoena shall issue for any witness unless the defendant is in custody or on bail, or the clerk or magistrate shall have good reason to believe that he will be apprehended. Subpoenas may be issued to different counties at the same time, but all the witnesses ordered at one time, and living in the same county, shall be included in one subpoena."

It is herein provided that the names of the witnesses must be endorsed upon the indictment or information, but no attempt is made to make either of these sections apply to the complaint or affidavit to be filed with a magistrate preceding a preliminary examination in a felony case.

Section 544.020 is as follows:

"Whenever complaint shall be made, in writing and upon oath, to any magistrate setting forth that a felony has been committed, and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant reciting the accusation, and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law."

This is the statute which governs the requirements of the complaint used as the basis of a preliminary examination, and nothing herein contained indicates or as much as suggests that the names of the witnesses must be endorsed upon the complaint. We fail to find any such requirement anywhere in the laws of Missouri.

We hold that the sections quoted above cannot be construed to give any such meaning to our statutes. The appellate courts of this state have held that the plain wording of a statute must not be subjected to the rules of technical construction. In the case of *Grier v. Railway Company*, 286 Mo. 523, 1.c. 534, the Supreme Court said:

Mr. Roy W. McGhee, Jr.

"It is sometimes advantageous to recur to elementary principles. We deem it so now. The primary rule for the interpretation of statutes is that the legislative intention is to be ascertained by means of the words it has used. All other rules are incidental and mere aids to be invoked when the meaning is clouded. When the language is not only plain, but admits of but one meaning, these auxiliary rules have no office to fill. In such case there is no room for construction. * * *"

In the case of Dahlin v. Missouri Comm. for the Blind, 262 S.W. 420, 1.c. 423, the Springfield Court of Appeals said:

"A statute that is clear in its terms, and leaves no room for construction must be enforced as written, but if it is not clear, and there is any room for construction, then the reason and sense of the statute will control in determining its meaning. * * *"


CONCLUSION

It is the opinion of this office that the names of the witnesses need not be endorsed upon the complaint or affidavit used as the basis of a preliminary examination in a felony case held under Section 544.250, RSMo 1949.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

TAXATION,

DELINQUENT TAX BILLS: The penalty on a delinquent tax bill is due and payable without previous notice to the taxpayer and begins to run on the first day of January.

October 9, 1951

10-11-51

Miss Ivella McWhorter
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri



Dear Miss McWhorter:

We have given careful consideration to your recent request for an opinion, which request is as follows:

"Under date of June 22, 1951, your office submitted an official opinion regarding personal taxes due on the automobiles owned by the sheriff of this county and used by his office for official duties. In that opinion you stated that personal taxes should be paid by the sheriff but the question has arisen whether or not interest is due on that amount since notice had not been given previously to the sheriff that such personal taxes were owed by him to the county, and if such interest should be paid on the amount, from what date should such interest be figured. That is, should it be figured from the first of the year or from the time that the sheriff was notified that such personal taxes were due."

Section 139.010, RSMo 1949, is as follows:

"It shall be the duty of the collectors of revenue of the several counties of the state, immediately after the receipt of the tax books of their respective counties, to give not less than twenty days' notice of the time

Miss Ivella McWhorter

and place at which they will meet the taxpayers of their respective counties, and collect and receive their taxes; said notice shall be given by posting up at least four written or printed handbills in different parts of each municipal township in said counties, and by publication for two weeks in a newspaper, if one be published in the county, in which he shall notify said inhabitants to meet the collector at such places in their respective townships as may be named therein, and the number of days, not less than three, that he will remain at each of such places for the purposes aforesaid; and it shall be his duty to attend at the time and place thus appointed, either in person or by deputy, to receive and collect such taxes; provided, the county court may relieve the collector from visiting any municipal township in his county by an order of record to be made before notice under the provisions of this section is given."

The county collector is herein required to give notice to the taxpayers unless relieved of such duty by the county court. The Supreme Court, however, has many times held that the failure of any such requirement does not invalidate the tax.

In the case of State ex rel. v. Wilson, 216 Mo. 215, 1.c. 287, the court said:

"The broad principle announced and underlying all of these cases is, that when a valid assessment is shown, its entry upon the tax-book and the failure of the property-owner to pay it when due, a good cause of action is made out, and that all other requirements and proceedings are mere formalities and intended to assist and facilitate the collection of the taxes, and are not intended to be stumbling blocks and hindrances thrown in the way of a speedy collection of them."

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Moreover, the notice herein required is a public notice. The statute does not undertake to make it the duty of the collector to give individual notices to the taxpayers of the county. We fail to find any law requiring the collector or any other officer to give such notices to the taxpayers in a county of the second class; and all taxes, therefore, are due and payable without notice.

Subsection 1 of Section 139.100, RSMo 1949, is as follows:

"1. If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector after the first day of January then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, the amount provided for in section 140.100."

It is evident from the plain wording of this law that the penalty of a delinquent tax bill begins to run on the first day of January of the ensuing year.


CONCLUSION

It is the opinion of this office that the penalty in the form of interest is due and payable on a delinquent tax bill in a county of the second class without any previous notice to the taxpayer. It is also the opinion of this office that such interest begins to run on the first day of January of the year in which the tax becomes delinquent.

Respectfully submitted,

APPROVED:

B. A. TAYLOR
Assistant Attorney General


J. E. TAYLOR
Attorney General

BAT/fh

COUNTY: Sole responsibility of the county to support poor inhabitants of said county. County cannot legally require such persons to turn over small pension or retirement grants.

October 18, 1951

Miss Ivella McWhorter
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri



Dear Miss McWhorter:

This will acknowledge receipt of your request for an official opinion, which reads:

"This office desires to submit for official opinion from your department the following set of facts and questions. The County Court of Greene County, Missouri maintains a County Farm to care for the poor persons of this County as defined by Section 205-950, Revised Statutes of Missouri, 1949. A portion of the buildings which houses the residents of this institution is devoted to hospital purposes in which is confined the ill and others requiring almost constant medical attention such as those residents who are senile. Some of these senile patients do receive each month very small pensions from sources such as a child of a Spanish American Civil War Veteran and some retirement benefits. Under the Statutes which would seem to indicate that the County cannot use this money although the County provides complete care of these patients. Therefore, the question is if a party is a resident of the Greene County Farm, confined in the hospital wing of the institution because of illness or senility can the County Court receive from the patients pension checks or retirement benefits which the patient receives as payment toward the upkeep and maintenance of the County Farm."

Section 205.580, RSMo 1949, provides that poor persons shall be maintained and supported by the county in which they are inhabitants. Said section reads:

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"Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Section 205.590, RSMo 1949, defines who shall be considered a poor person under this particular chapter as such persons aged, infirm, lame, blind or sick, who are unable to support themselves and who have no other person legally required to support them. Said section reads:

"Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons."

Also, Section 205.600, RSMo 1949, requires an inhabitant as hereinabove defined to have resided in the county at least 12 months preceding the time of any order made respecting such poor person. Section 205.600 reads:

"No person shall be deemed an inhabitant within the meaning of sections 205.580 to 205.760, who has not resided in the county for the space of twelve months next preceding the time of any order being made respecting such poor person, or who shall have removed from another county for the purpose of imposing the burden of keeping such poor person on the county where he or she last resided for the time aforesaid."

Section 205.610, RSMo 1949, further provides that the county court shall provide at the expense of the county relief, maintenance and support for such persons. Said section reads:

"The county court of each county, on the knowledge of the judges of such tribunal, or any of them, or on the information of any magistrate of the county in which any person entitled to the benefit of the provisions of sections 205.580 to 205.760 resides, shall from time to time, and as often and for as long a time as may be necessary, provide, at the expense of the county, for the relief, maintenance and support of such persons."

There are also other provisions under this particular chapter authorizing county courts to erect a poorhouse or homes

Miss Ivella McWhorter

for the purpose of sheltering and taking care of such poor inhabitants in the county.

One of the primary rules of statutory construction is to ascertain and give effect to legislative intent. See City of St. Louis v. Senter Commission Co., 85 S.W. (2d) 21, 337 Mo. 238. Another equally established rule of statutory construction is that all acts in pari materia should be construed together so as to give effect to each, if possible. State ex rel. Columbia National Bank of Kansas City v. Davis, 314 Mo. 373, 284 S.W. 464. Also State ex inf. Barker v. Koeln, 192 S.W. 748, 270 Mo. 174.

All of the provisions hereinabove quoted clearly indicate that the responsibility of the support of poor inhabitants of a county is placed directly upon the county itself. In view of this, the question boils down to whether the sick and possibly senile persons in the hospital at the county poor farm home come within the definition of poor inhabitants of your county. If the county finally determines they are, then it clearly is the responsibility of the county and the county is in no position to require such persons to turn over to it some small pension check or retirement allowance which they have received, which of itself is clearly inadequate in any manner to support such recipients.


CONCLUSION

Therefore, it is the opinion of this department that if a person is admitted to the county poor farm and hospital as a poor inhabitant of the county, it is the responsibility and duty of the county to support such person as long as he is unable to support himself, and the county cannot require such persons to turn over to the county some small check representing a pension or retirement allowance, which of itself is clearly inadequate to support the person.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

ARR:VLM

LIVESTOCK:
UNFENCED LAND:
OPEN RANGE TERRITORY:

United States of America not required to fence,
wild life refuge located in open range terri-
tory to keep ranging cattle from ranging or
grazing within the boundaries of the refuge.

October 31, 1951

11/1/51

Honorable Roy W. McGhee, Jr.
Prosecuting Attorney
Wayne County
Greenville, Missouri



Dear Sir:

Your opinion request of June 5, 1951, upon reassignment, is before me for an opinion. Prior to its assignment to me, this office again, on July 21, 1951, received another request in which you restated your proposition, the pertinent part of the June 5th letter reads:

"The Federal government owns a large amount of land here in our county as a result of the Wappapello and Clearwater dams. Several farmers have leased portions of this land for farming purposes, and in certain of the "open range" townships other farmers are allowing their stock to run free on this land.

"The land is unfenced, and I am wondering if the Federal government stands in a different position in this respect than would an individual owner, i.e., can the government keep the stock out without fencing?"

We believe the following cases cited answer the question about the government fencing its land--Shannon vs. U. S., 165 Fed. Rep. 870; U.S. vs. Travis, 66 Fed. Sup. 413.

In the Travis case, supra, the court held that the Federal Government was under no obligation to fence its land included in the migratory bird refuge due to the fact that the state laws gave to the subjects of the state rights that extended only to the lands of the state and up to the border of those owned by the United States. Then too, the Secretary of the Interior had issued regulations for the administration of wild life refuges and in this case is set out Section 16.3, which reads as follows:

Hon. Roy W. McGhee

"'Sec. 16.3. Grazing. No cattle, sheep, horses, or other livestock are permitted to graze on the public lands within the exterior boundaries of such game ranges, or refuges, except under permit of the Secretary of the Interior and in accordance with such conditions as he may prescribe therein and no grazing is permitted on lands within the exterior boundaries of such game ranges or refuges, which have been or which hereafter may be acquired by the United States for the use of the Department of Agriculture for the conservation of migratory birds and other wildlife, except under permit of the Secretary of Agriculture and in accordance with such conditions as he may prescribe therein.'"

The court further, at page 415 of its opinion, said:

"'It could not give to the people of that state the right to pasture cattle upon the public domain, or in any way to use the same. Its own laws in regard to fencing and pasturing cattle at large must be held to apply only to land subject to its own dominion. No one within the state can claim any right in the public land by virtue of such a statute. The United States have the unlimited right to control the occupation of the public lands, and no obligation to fence these lands, or to join with others in fencing them for the purpose of protecting its rights can be imposed by a state. The rights given by the state statutes to the subjects of the state extend only to the lands of the state. They end at the borders of the government lands. At that border the laws of the United States intervene, and it is within their province to forbid trespass. Such laws being within the power of Congress, it is not necessary to discuss the question whether it is sovereign power or police power, of what may be its nature, for there is no power vested in the state which can embarrass or interfere with its exercise.'"

In this case the court discusses *Shannon v. U.S.* supra, and cites many more cases of like kind where the decision was the same as here, where the court decided that landowners living in

Hon. Roy W. McGhee

open range territory, of which the United States lands were a part, could be enjoined in an equity proceeding from allowing their cattle to range and graze upon government land included in the wild life refuge.

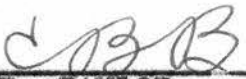
CONCLUSION

It is, therefore, the opinion of this office that the United States, as an owner of land, is not required to fence its land included in wild life refuge in open range territory as is required of private landowners, to keep stock from ranging and grazing upon their land.

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

ABE:mv

COUNTY ASSESSOR: A county assessor who has failed to make a real property list within the time and manner prescribed by law cannot subsequently make such a list and receive compensation therefor.

September 17, 1951

9-18-51

Honorable John H. Mittendorf
Prosecuting Attorney
Johnson County
Warrensburg, Missouri



Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

"The Assessor of this County has requested an opinion on the following question:

"In making the Assessment of Personal Property and the Real Estate for the year 1950, I did not make a list of each piece of Real Property which I am required to do and for which I am entitled to receive compensation under Sections 137.075, 137.080, 137.115, 137.120, 137.175, 137.130 and 53.130 Revised Statutes of Missouri 1949. According to the above sections of R.S. of Missouri 1949, I believe I am entitled to make out the Assessment Lists for the Real Estate and receive compensation for the lists I did not make in 1950. Please advise me if I am entitled to make lists of Real Estate for the year 1950, which I have not made, and which I am entitled to make and to receive compensation for same."

Subsequent to the receipt of your letter of request, we have been informed verbally by your county assessor that in the year 1950 he did make lists of real estate belonging to non-resident owners, but that he did not make any other lists of real estate. He has further informed us that he did assess all of the real estate in the county, but, as stated above, that he made lists only of real estate owned by non-residents.

The question which you ask is whether the assessor may now make lists of all the real estate in the county which he assessed in 1950, but for which he did not make lists, and receive compensation therefor.

Honorable John H. Mittendorf

Section 137.115, RSMO 1949, states in part:

"After receiving the necessary forms the assessor or his deputy or deputies shall except in the city of St. Louis, between the first day of January and the first day of June, 1946, and each year thereafter, proceed to make a list of all real and tangible personal property in his county, town or district, and assess the same at its true value in money in the manner following, to wit: * * *"

It will be noted that the above section requires the assessor, between the first day of January and the first day of June of each year, to make a list of all real and tangible personal property in his county. Section 53.130, RSMo 1949, provides compensation for the assessor for making the lists mentioned in Section 137.115, supra. Section 53.130, RSMo 1949, states in part:

"The compensation of the county assessor in counties of the third class shall be forty-five cents per list, and each county assessor shall be allowed a fee of six cents per entry for making real estate and tangible personal assessment books, all the real estate and tangible personal property assessed to one person to be counted as one name, one-half of which shall be paid out of the county treasury and the other one-half out of the state treasury. * * *"

It will be observed that Section 137.115, supra, makes it mandatory upon the assessor to make his lists of all real and tangible personal property between the dates of January first and June first of each year. This the assessor of Johnson County did not do for the year 1950, except, as noted above, in the case of real estate owned by non-residents. He did make a list of all tangible personal property.

If the assessor can now, fifteen months after the time when he was required to complete his real estate lists for 1950, make such lists and receive compensation therefor, it can only be upon the ground that the law allows exceptions to the time stated for making such lists as set forth in Section 137.115 quoted in part above.

Honorable John H. Mittendorf

We are unable to find, either in the law or in the cases, any such exception. We have carefully noted the sections of Missouri law cited by you in your letter to us, but we cannot see that any of them apply to the instant situation.

It is a well established law in Missouri that before a public officer is entitled to receive compensation, he must be able to point out a specific law which entitles him to such compensation. This, as we stated above, we are unable to find for your assessor under the circumstances set forth.

We are of the opinion that a county assessor cannot receive compensation for real estate lists made after the time fixed by Section 137.115, supra, for making such lists.

In 1903 the St. Louis Court of Appeals rendered its opinion in the case of City of Hannibal ex rel. v. Bowman, 98 Mo. App. 103. This case did not touch upon the matters involved in the instant case, but in that opinion the court stated, as dictum, in reference to limits upon the power of an assessor, that, l.c. 108:

"He can only proceed at the time and in the manner pointed out by statute and to justify his assessment he must be able to put his finger on the statute that gives him the authority to make it. Welty on Assessments, p. 36; Cooley on Taxation (2 Ed.), p. 42, note 3; Hamilton v. Amsden, 88 Ind. 304; Whitney v. Thomas, 23 N.Y. 281. * * *"
(Emphasis ours.)

In the instant case the assessor clearly did not proceed, in the making of real estate lists, "at the time," prescribed by statute, nor "in the manner."

In the 1921 case of State ex rel. Flaugh v. Jaudon, 286 Mo. 181, the Supreme Court of Missouri held, l.c. 192, that:

"* * * in each year from June 1st to the following January 1st, there must be listed and assessed all real estate, and it might be added all personal property, but such is not here involved. This assessment so made forms the basis for the state and county taxes of the next year, or the year beginning with the January 1st, upon which the assessment by the assessor is presumed to close.
* * *"

Honorable John H. Mittendorf

The above case was decided before the change in assessment dates, but it is our belief that the same legal principle, which is that the assessment and lists must be completed within the time prescribed by statute, would be equally applicable at this time.

The 1936 case of *State v. Gomer*, 340 Mo. 107, 1.c. 114, holds that:

"* * * The assessor is required to 'value and assess all the property' on his books 'according to its true value in money' and to return a copy thereof to the county court within the time fixed. * * *"

The Jaudon and Gomer cases cited above sustain the plain language of the statute that assessors' lists must be made within the time prescribed by statute.

The Gomer case also holds, 1.c. 116, that:

"* * * No doubt the purpose for requiring real estate to be listed in the personal property list, delivered to the assessor, was to give him information in order to assist him in keeping his books correct and up to date as to descriptions and owners of land, and to show the owner's idea of its value. * * *"

In the 1903 case of *State ex rel. v. Carr*, 178 Mo. 229, the court held, 1.c. 238, that:

"Moreover, such lists whether made by the taxpayer or by the assessor are only memoranda for the personal use of the assessor in making up the assessment book. They are not evidence in a suit for the collection of the taxes assessed."

In the 1905 case of *State ex rel. v. Birch*, 186 Mo. 205, the court held, 1.c. 214:

"* * * The assessment lists are mere preliminary memoranda for the assessor's use, and not evidence in a suit for the collection

Honorable John H. Mittendorf

of taxes. (State ex rel. v. Carr, 178 Mo. 229.) The tax books are the primary evidence. (State v. Hutchinson, 116 Mo. l.c. 402.) * * *

The Gomer, Carr, and Birch cases cited above, point out that the assessment lists are made solely for the personal use of the assessor to assist him in making his assessments, and are in the nature of memoranda. The making of such lists long after the assessments have been made would, from the standpoint of the county and state, be completely pointless and without the slightest value.

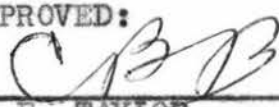
CONCLUSION

It is the opinion of this department that a county assessor who has failed to make a real property list within the time and manner prescribed by law cannot subsequently make such a list and receive compensation therefor.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:



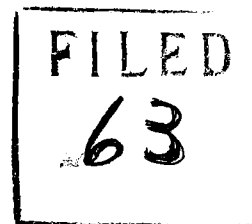
J. E. TAYLOR
Attorney General

HPWab

INHERITANCE TAX:
PROSECUTING ATTORNEY:

Prosecuting Attorney not qualified
to act as appraiser in fixing state
inheritance taxes.

February 6, 1951



Honorable J. Hal Moore
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

Dear Sir:

This department acknowledges receipt of your request for an opinion which reads as follows:

"I would like your opinion as to whether it is lawful for the Prosecuting Attorney to be appointed appraiser for inheritance tax of a deceased person's estate."

The procedure for fixing and determining inheritance taxes due the State of Missouri is to be found in Chapter 145, p. 1424, RSMo 1949, Section numbers hereafter referred to are sections of RSMo 1949.

Section 145.150 authorizes the probate court upon his own motion or on the application of the Prosecuting Attorney or other persons to appoint some qualified tax paying citizen of the county as appraiser to appraise and fix the taxable value of any property or interest therein or income therefrom subject to the payment of inheritance tax under the provisions of Chapter 145.

Subdivision 4 of Section 145.150 requires such appraiser when appointed to take, subscribe and file with the appointing court an oath to faithfully and impartially discharge his duties as such appraiser. Thereupon such appraiser shall fix a time and place for hearing evidence as to the proper amount of such inheritance tax and give notice of such hearing by mail to all interested persons, including the Prosecuting Attorney of the county wherein the estate is being administered.

Section 145.270 makes it the duty of the Prosecuting Attorney to represent the state at all hearings, proceedings and trials in the probate and circuit courts had under Chapter 145. The Attorney

Honorable J. Hal Moore

February 6, 1951

General, at the request of the State Director of Revenue, is required to assist the Prosecuting Attorney in any such hearings, proceedings or trials.

Section 145.280 requires that the Prosecuting Attorney of the county wherein the estate is being administered, on his own initiative or at the request of the Director of Revenue, institute suits in any court of competent jurisdiction for the recovery of unpaid state inheritance taxes.

Inheritance tax hearings inevitably center around the value of taxable property. The state and Prosecuting Attorney are interested in the greater valuation, the taxpayer in the lesser.

It is a fundamental of the law, deep rooted in justice and principle, that no person in a judicial or quasi-judicial position may sit in judgment on matters in which he has a personal interest or in which those whom he represents may be financially involved. The duty of the Prosecuting Attorney is first to represent the state, his county and its citizens. It is too obvious for argument that he would not be a qualified appraiser for the purpose of fixing the amount of inheritance taxes due the State of Missouri and be paid by persons whose interests may be opposed to those of the State of Missouri.

CONCLUSION

It is the opinion of this department that the Prosecuting Attorney of a county wherein an estate is being administered is not qualified to act as appraiser for the purpose of fixing inheritance taxes due the State of Missouri.

Respectfully submitted,

GILBERT LAMB
Assistant Attorney General

APPROVED BY:

J. E. TAYLOR
Attorney General

MUNICIPAL
AIRPORTS:

If the State of Missouri acquires the Jefferson City Memorial Airport under the provision of the proposed law ~~above set forth~~ the State will take the property subject to the existing ninety-nine year lease.

FILED

63

February 28, 1951

3-5-51

Honorable H. H. Mobley
Director
Missouri Division of Resources and Development
Jefferson City, Missouri

Dear Mr. Mobley:

We have your recent letter requesting an opinion of this Department with which letter you transmit a copy of a proposed bill to be introduced in the Legislature and also a copy of a lease heretofore entered into by the City of Jefferson and Raymond Brummet doing business as the Brummet Aircraft Company.

Your letter is as follows:

"At the request of Senator Edward V. Long the attached proposed legislation has been prepared. It authorizes the Division of Resources and Development to acquire, improve and operate in the name of, and on behalf of, the State of Missouri the airport now owned by the City of Jefferson, Missouri.

"Before the bill can be introduced Senator Long desires an opinion on the following question regarding a lease(copy attached) by the City of Jefferson and Raymond Brummet, doing business as the Brummet Aircraft Company.

"1. If the State of Missouri acquires the Jefferson City Memorial Airport under the provisions of the proposed law will the attached lease be binding on the State of Missouri?"

We requote your specific question which you want us to answer in our opinion as follows:

"1. If the State of Missouri acquires the Jefferson City Memorial Airport under the provisions of the proposed law will the attached lease be binding on the State of Missouri?"

Hon. H. H. Mobley

As a prerequisite to the discussion of said question we quote what we consider the relevant portion of the said proposed bill and also what seems to us to be the relevant part of the lease in question. The relevant portions of the bill seem to us to be the title thereof and sections 1, 2 and 5, and section 7, subdivision 1. The quoted portions of the bill are as follows:

"AN ACT

"Authorizing the division of resources and development of the department of business administration to acquire, operate, maintain, improve and enlarge the airport known as the 'Jefferson City, Missouri Memorial Airport'.

"Section 1. When used in this act the term 'division' shall mean the division of resources and development of the department of business and administration.

"Section 2. The division is hereby authorized, on behalf of, and in the name of the state, to, by purchase or gift, acquire the property known as the 'Jefferson City, Missouri Memorial Airport', and to plan, construct, own, operate, lease, equip, regulate and maintain the same together with the improvements thereon, including buildings, air navigation facilities and all other facilities necessary for the servicing of aircraft and for the accomodation of air travelers.

* * * * *

"Section 5. 1. In operating the said airport the division may enter into leases and other arrangements for a term not exceeding ten years with any persons, firm or corporation for:

"(1) granting the privilege of using or improving such airport or any portion or facility thereof or space therein for commercial purposes;

"(2) conferring the privilege of supplying goods, commodities, things, service or facilities at such airport; or

"(3) making available services to be furnished by the division or its agents at such airport.

"2. In each such case the commission may establish the terms and conditions and fix the charges, rentals

Hon. H.H. Mobley

or fees for the privileges or services, which shall be reasonable and be established with due regard to the property and improvements used and the expenses of operation to the state.

* * * * *

"Section 7. 1. The division may perform such acts, issue and amend such orders, and make, promulgate and amend such reasonable general or special rules, regulations and procedures, and establish such minimum standards as it shall deem necessary to carry out the provisions of this act and to perform its duties hereunder."

Our examination of the copy of the aforesaid lease to the Brummet Aircraft Company convinces us that the only portion of said lease which is relevant to a consideration of the question presented is the following language found in the first paragraph of the last page thereof:

"* * * This lease shall be subordinate to the provisions of any existing or future agreement between Lessor or the United States or State of Missouri relative to the operation or maintenance of the airport, the execution of which has been required as a condition precedent to the expenditure of Federal funds or which has been or will be required as a condition precedent to the expenditure of state funds for the development of the airport."

The lease in question is a ninety-nine year lease covering a period extending from June 1, 1944 to May 31, 2048, being from the City of Jefferson to Raymond Brummet, doing business as Brummet Aircraft Company and covers the land appearing in exhibit "A" recited to be attached thereto. However, a copy of said exhibit is not attached to the copy of the lease before us but we are informed that it merely describes the portion of the airport land covered by the lease.

The lease grants the right to erect buildings on the leased property according to specifications in exhibit "B" thereto attached. The lease provided that the contemplated buildings shall be constructed within a reasonable time. It also provides for an annual rental of five cents per square foot for the property leased.

It seems to us that whatever were the purposes of this lease the provision thereof, hereinabove quoted is the only provision that need be discussed in arriving at a conclusion as to whether or not, in the

Hon. H. H. Mobley

event of the acquisition of the Jefferson City Municipal Airport by the State of Missouri pursuant to the provisions of the proposed act above quoted, the above-mentioned lease will be binding upon the State of Missouri.

We consider that we are warranted in assuming that the word "of" being the twelfth word of the above quoted portion of said lease should be construed to have been intended to be the word "or" for the reason that it is only under that construction that the sentence has meaning or makes sense and we believe that we are further warranted in assuming that the word "or" being the seventeenth word of the above quoted portion of said lease should be construed to have been intended to be the word "and" for the same reason and we point out that under these constructions of the respective words above mentioned the above quoted portion of said lease would read as follows: "This lease shall be subordinate to the provisions of any existing or future agreement between Lessor and the United States or State of Missouri relative to the operation or maintenance of the airport, the execution of which has been required as a condition precedent to the expenditure of Federal funds or which has been or will be required as a condition precedent to the expenditure of state funds for the development of the airport."

From an examination of the aforesaid lease as a whole we are of the opinion that the lessee thereunder acquired rights which, assuming compliance with the provisions of the lease by the lessee, will endure unabated for ninety-nine years from the date thereof unless the deed accomplishing the transfer of title to the airport property from the City of Jefferson, the lessor in said lease, to the State of Missouri pursuant to the provisions of the proposed statute can be construed to be an agreement between the City of Jefferson and the State of Missouri relative to the operation or maintenance of the airport, the execution of which has been required as a condition precedent to the expenditure of state funds for the development of the airport.

We are of the opinion that such a deed could not be considered as such an agreement within the meaning of the above quoted subordination provision of the lease for the reason that leases like all other contracts must be construed in the light of the intention of the contracting parties at the time of entrance into the contract and we are of the opinion that at the time of the execution of the lease it was the intention of the City of Jefferson, the lessor, by inserting this subordination provision in the lease, to create a

Hon. H. H. Mobley

safeguard against the loss of a possible future federal or state grant which grant might be defeated by the failure to meet some requirement set forth by the act which provides for the grant upon compliance with which the said grant might be made contingent which requirement might be inconsistent with the operation of the lease and we are of the opinion that the lessee, Brummet Aircraft Company, acquiesced in the said provision by accepting the lease. In arriving at this opinion we take note of the fact that there have been within recent years numerous federal grants to municipalities conditioned upon various requirements, the fulfillment of which were conditions precedent to the obtaining of federal assistance and of the further fact that the State sometimes grants money to political subdivisions and specifies certain conditions precedent which failure to comply with will keep the political subdivisions in question from obtaining the assistance. An illustration is the grant of state aid to school districts contingent upon specified requirements.

We are of the further opinion that if such was the intention of the parties when they inserted said subordination provision in the lease the operation of that subordination provision is restricted to a set of circumstances under which an agreement is entered into by the City of Jefferson and the United States or by the City of Jefferson and the State of Missouri or by the City of Jefferson and some third party relative to maintenance and operation of the airport which agreement provides for things required as prerequisite to the obtaining of a federal or state grant. It therefore appears to us that the subordination provision of the last above quoted portion of the lease referred to will not be brought into operation by the acquisition of the Jefferson City Memorial Airport under the provisions of the proposed law.


CONCLUSION

We are accordingly of the opinion that if the State of Missouri acquires the Jefferson City Memorial Airport under the provision of the proposed law above set forth the State will take the property subject to the existing ninety-nine year lease.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

SMW:mw

COUNTY OFFICERS: PAYMENT
OF FEES TO: WHEN

County clerk of third class county entitled to fees for tax extensions in 1947-48; may subsequently request payment of county's part; fees are fixed by legislature and are automatically in budget by operation of law. Fees may be paid in subsequent years from available funds of county though item not actually included in budget for year in which payment is to be made.

March 1, 1951

3-9-51



Honorable J. Hal Moore
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads as follows:

"In re: Revised Statute No. 10400

"Does the above statute require a third-class county as is our county, to pay the Treasurer a certain amount or any amount for taking care of school money? Under the interpretation of this statute, is it possible for the County Court to allow no extra fees to the Treasurer without recourse on them or the County?

"In re: County Clerk's salaries and fees.

"On January 3, 1950 your office released an opinion and I quote 'County Clerks of third and fourth class counties entitled to retain fees for extending the tax books for 1947 and '48' Query: Where a County Clerk has not retained any fees for these years, is the County Court obligated to pay him his fees out of the County and State fund?"

Honorable J. Hal Moore

Your first inquiry is whether or not Section 10400 R. S. Mo. 1939, requires a third class county, such as your own, to pay the county treasurer a certain amount for taking care of the school moneys, and whether or not the county court's refusal to allow the treasurer extra fees for the performance of his duties relating to the school moneys may be had without recourse on the court or the county.

We assume that the "extra fees" in the opinion request has reference to fees of the county treasurer for performance of his duties relating to the school moneys claimed in addition to the salary of the treasurer as provided by Section 1, page 1540, Laws of 1945.

Section 10400, Mo. R. S. 1939, referred to above, has been repealed and in its place Section 54.160, RSMo 1949, has been enacted, which reads as follows:

"The county treasurer in each county shall be the custodian of all moneys for school purposes, belonging to the different districts, until paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district, as authorized by law, except in counties having adopted the township organization law, in which counties the township trustee shall be the custodian of all school moneys belonging to the township, and be subject to corresponding duties as the county treasurer; and said treasurer shall pay all orders heretofore legally drawn on township clerks, and not paid by such township clerks, out of the proper funds belonging to the various districts; and on his election, before entering upon the duties of his office, he shall give a surety company bond, with sufficient security, in the probable amount of school moneys that shall come into his hands, payable to the state of Missouri, to be approved by the county court, and paid for by the county court out of the county common school funds, conditioned for the faithful disbursement, according to law, of all such moneys as shall from time to time come into his hands; and on the forfeiture of such bond it shall be the duty of the county clerk to collect the same for the use of the schools in the various

districts. If such county clerk shall neglect or refuse to prosecute, then any freeholder may cause prosecution to be instituted. It shall be the duty of the county court in no case to permit the county treasurer to have in his possession, at any one time, an amount of school moneys over the amount of the security available in the bond; provided that the county treasurer in any county of the third class or fourth class may furnish either a personal or surety bond and in case a surety bond is required by the county court in said county, said surety bond shall be paid for by said county."

Under the provisions of this section it is the duty of the county treasurer in each county to be the custodian of all school moneys belonging to the districts of the county, and to disburse said moneys in the manner therein provided.

Neither this section of the statutes, nor any other provide, that for being the custodian, and for the disbursement of the school moneys of his county the treasurer shall be entitled to any fee for such services.

In the absence of specific statutory provisions allowing him a fee for the performance of duties imposed upon him by law, a public officer is not entitled to a fee. This principle of law has long been established as the general rule in Missouri, and has been so declared by a number of court decisions, and we desire to call attention here to a few of them, as follows:

In the case of State ex rel. Brown, 146 Mo. 401, the court held that a sheriff was not entitled to certain fees claimed, since they were not authorized by statute. At l. c. 406, the court said:

"It is well settled that no officer is entitled to fees of any kind unless provided by statute, and being solely of statutory rights, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the

Honorable J. Hal Moore

statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

Again, in the case of Nodaway County v. Kidder, 344 Mo. 795, at l. c. 801, the court said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. * * *"

In view of the holdings of the above cited cases, and in the absence of any provisions of Section 54.160, supra, or those of any other statutes, it is our thought that the county treasurer must perform his duties as custodian of the school moneys belonging to the districts of his county, and to disburse said moneys in the manner provided by said section, but that in so doing he is not entitled to any fees for his services in addition to the salary as treasurer to which he is entitled under the provisions of Section 1, page 1540, Laws of 1945, and that the county court lacks the power to allow said treasurer any amount as fees for the performance of those duties required of the treasurer under Section 54.160, supra.

Your next inquiries have to do with the county clerk's salary and fees, the first question being as follows: "Where a County Clerk has not retained any fees for these years, is the County Court obligated to pay him his fees out of the Court and State fund?"

This inquiry has been more clearly explained in your letter of January 29, 1951, to this department in which it is stated:

"The information which I want in regard to the County Clerk's salaries and fees pertains to the following situation: Our County Clerk did not retain any fees for 1947 and '48 but handed all money back to the County Treasurer and the question that arises in my mind is when he has failed to retain the fees that are allowed

Honorable J. Hal Moore

him, can he now, at this date, request the County Court to pay these fees? Second question: Does the County Court have to budget for these fees before the County Clerk can collect them if he is entitled to do so?"

The opinion of this department referred to in your first letter is dated December 15, 1950, and contained a reference to an opinion dated November 23, 1949, holding that clerks of third and fourth class counties were, under the provisions of House Bill No. 126 of the 65th General Assembly, entitled to a fee of three cents per name for extending the tax books, the particular reference being:

"Therefore, it would appear that the fee allowed to the county clerk for extending the taxes has been, and is now an unaccountable fee. * * * this fee allowed the county clerks has, at least since November 1945, been unaccountable, and therefore the provision of House Bill 126, did not increase the compensation during the present term of the clerks, which began January 1, 1947."

That part of House Bill 126, allowing fees to the county clerks for extension of the tax books is now Section 51.400 RSMo 1949, and reads as follows:

"The following fees and compensation shall be allowed to and retained by the clerk of the county court, as unaccountable fees, in addition to the salary and other fees now provided by law, for services rendered:

"(1) For extending the tax on the assessment book, three cents for each name, to be paid by the state and county in proportion to the number of tax columns used by each: * * *"

We interpret the statute as meaning that the respective obligations of the county and state to each pay their proportional part of the clerk's fees became fixed on the date the services were performed. This being a valid obligation at the time it was contracted, neither non-payment by the county or state, nor the mere lapse of time could render the obligation illegal, or affect the right of the clerk to demand payment of his fees in years subsequent to those in which the fees were earned, since payment appears to be the only method by which the obligation could legally be discharged.

Honorable J. Hal Moore

While the opinion request does not state, but in the absence of information to the contrary, it is assumed that the county clerk was paid the salary to which he was entitled under the statute for the year, 1947-48. Since he was also entitled to the fees provided by House Bill No. 126, supra, for those years in addition to his salary, he received less compensation than that to which he was legally entitled, and in so doing he was not precluded from subsequently claiming the legal compensation due him. We base our conclusion upon what appears to be the general rule in such matters, as stated in Corpus Juris Secundum, under the title of "Officers" Volume 67, page 358, as follows:

"It is generally held, at common law and in the absence of statute otherwise providing, that the acceptance of less compensation than that established by law for the office does not preclude the officer, on the ground of waiver, estoppel, or the like, from subsequently claiming the legal compensation. * * *"

Also the rule in Missouri appears to have been well stated in the case of Reed v. Jackson County, 346 Mo. 720, in which the court said at l. c. 726:

"In view of our statute and court decisions, especially the Rothrum case, it seems clear that to permit public officers, elected or appointed, to receive, by agreement or otherwise, a less compensation for their services than fixed by law, would be contrary to the public policy of the State. * * *"

In view of the foregoing, and in answer to your inquiry, it is our thought that the county clerk of your county may at this time file his account for that part of his fees earned in 1947-48, for which the county is liable, with the county court. That upon receipt of such account it shall be the duty of the court to allow or reject the claim, and if allowed, to order payment of whatever sum is found to be due, on the account from any available funds in the county treasury.

Your last inquiry is whether or not (in the event it is held that the county clerk is still entitled to his fees at this date) the county court will be required to include the amount of fees of the county clerk in the county budget, before the clerk can collect same.

Every proposed expenditure of the county must, under the provisions of Section 50.670 RSMo 1949, be included in the budget for the year in which the expenditure is to be made, the provisions

Honorable J. Hal Moore

of said section reads as follows:

"This law may be cited and quoted as 'The County Budget Law.' All counties of the third and fourth classes shall be governed by sections 50.670 to 50.740. Whenever the term 'revenue' is used in sections 50.530 to 50.740 it shall be understood and taken to mean the ordinary or general revenue to be used for the current expenses of the county as is provided by sections 50.530 to 50.740 regardless of the source from which derived. The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures for the year beginning January first, and ending December thirty-first. The receipts shall show the cash balance on hand as of January first and not obligated, also all revenue collected and an estimate of all revenue to be collected, also all moneys received or estimated to be received during the current year. The clerk of the county court of the several counties of this state shall be the budget officer of such county and as such shall prepare all data, estimates and other information needed or required by the county court for the purpose of carrying out the provisions of sections 50.530 to 50.740 but no failure on the part of the clerk of the county court shall in any way excuse the county court from the performance of any duty herein required to be performed by said court. The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

The proposed expenditures of the county are to be listed under six different classifications, under the provisions of Section 50.680 RSMo 1949, as follows:

"The court shall classify proposed expenditures in the following order:

"Class 1. The county court shall set aside and apportion a sufficient sum to care for insane

pauper patients in state hospitals. Class one shall be the first obligation against the county and shall have priority of payment over all other classes.

"Class 2. Next, the county court shall set aside a sum sufficient to pay the cost of elections and the cost of holding circuit court in the county where such expense is made chargeable by law against the county except where such expense is provided for in some other classification by this law. This shall constitute the second obligation of the county and all proper claims coming under this class shall have priority of payment over all except class one. In estimating the amount required in class two the county court shall set aside and apportion in the budget a sum not less for even years than the sum actually expended in the last even numbered year and for odd years an amount not less than the amount that was actually expended during the last preceding odd numbered year.

"Class 3. The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or construction of bridges and roads on other than state highways (and not in any special road district). The funds set aside and apportioned in this class shall be made from the anticipated revenue to be derived from the levies made under section 137.555, RSMo 1949. This shall constitute the third obligation of the county.

"Class 4. The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendable nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six.

"Class 5. The county court shall next set aside a fund for the contingent and emergency expense of the county, the court may transfer any surplus funds from classes one, two, three, four to class five to be used as contingent and emergency expense. From this class the county court may pay

contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes.

"Class 6. After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose; provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six; provided that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class six."

The fees of county officers, are one of the authorized proposed expenditures of the county, and are required to be listed under one of the six classifications in the budget for the year in which such proposed expenditures are to be made.

Although the County Budget Law requires the budgeting of such items of proposed expenditure it has been held by the Supreme Court of Missouri, that since the legislature has evidently provided for and fixed the salaries of county officers, that such salaries are really a part of the county budget whether or not they are actually included in the budget as prepared. This holding is set forth in the court's opinion in the case of Gill v. Buchanan County, 142 S. W. (2d) 665, and at l. c. 668, the court said:

"However, as hereinabove noted, salaries of county judges are fixed by the Legislature and the Constitution prevents even the Legislature from changing them during the terms for which they were elected. Surely, the county court cannot change them, by either inadvertently or intentionally providing greater or less amounts in the salary fund in the budget. The action of the Legislature in fixing salaries of county officers is in effect a direction to the county court to include the necessary amounts in the budget. Such statutes are not in conflict with the County Budget Law but must be read and considered with it in construing it. They amount to a mandate to the County Court to budget such

amounts. Surely no mere failure to recognize in the budget this annual obligation of the county to pay such salaries could set aside this legislative mandate and prevent the creation of this obligation imposed by proper authority. Certainly such obligations imposed by the Legislature were intended to have priority over other items as to which the county court had discretion to determine whether or not obligations concerning them should be incurred. They must be considered to be in the budget every year because the Legislature has put them in and only the Legislature can take them out or take out any part of these amounts. This court has held that the purpose of the County Budget Law was 'to compel * * * county courts to comply with the constitutional provision, section 12, art. 10' by providing 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.' *Traub v. Buchanan County*, 341 Mo. 727, 108 S.W. 2d 340, 342.

"To properly accomplish that purpose, mandatory obligations imposed by the Legislature and other essential charges should be first budgeted, and then any balance may be appropriated for other purposes as to which there is discretionary power. Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey, cannot bar the right to be paid the balance. Instead, it must be the discretionary obligations incurred for other purposes which are invalid, rather than the mandatory obligation imposed by the same authority which imposed the budget requirements. We, therefore, hold that a county court's failure to budget the proper amounts necessary to pay in full all 'county officers' salaries fixed by the Legislature does not affect the county's obligation to pay them."

While the court in that part of the opinion quoted above specifically referred to the salaries of county officers, and whereas the matter under discussion herein involves fees and not salaries, it is still our thought that the ruling of the court in the above quoted opinion is also applicable to the fees of county officials since both salaries and fees of such county

officials are provided for in the statutes passed by the legislature, and also for the reason that any expenditure specifically provided for by the legislature should of course be included in the budget, but if not included in the budget should be considered as automatically included therein, and as taking precedence over other expenditures to which the county court has been given discretion by the legislature. It is our further thought that the ruling of the Gill case as set forth in the above quoted portion of the opinion, applies not only to salaries of county officers fixed by the legislature but that it also applies to fees of county officers as well as to any and all other expenditures specifically provided for by the legislature and is, as we believe, fully established by the decision in the case of State v. Wade, 231 S. W. (2d) 179, in which the court cited the case of Gill v. Buchanan County with approval in the following language:

"Respondents' failure to make provision for this in the county budget is not decisive. In Gill v. Buchanan County, 346 Mo. 599, 142 S. W. 2d 665, 668, we held that failure to make provision in the budget for the amounts necessary to pay in full, all county officers' salaries fixed by the Legislature did not affect the county's obligation to pay them. We said: 'The action of the Legislature in fixing salaries of county officers is in effect a direction to the county court to include the necessary amounts in the budget. * * * Certainly such obligations imposed by the Legislature were intended to have priority over other items as to which the county court had discretion to determine whether or not obligations concerning them should be incurred. They must be considered to be in the budget every year because the Legislature has put them in and only the Legislature can take them out or take out any part of these amounts. * * * Mandatory obligations imposed by the Legislature and other essential charges should be first budgeted, and then any balance may be appropriated for other purposes as to which there is discretionary power. Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey, cannot bar the right to be paid the balance. Instead, it must be the discretionary obligations incurred for other purposes which are invalid, rather than the mandatory obligation imposed by the same authority which imposed the budget requirements.' * * *"

Honorable J. Hal Moore

We are therefore of the opinion that in view of our holding discussed above that the law has provided for the payment of fees to the county clerk as previously mentioned, and even though such fees have not been included in the county budget, nevertheless, they may be paid from available funds because they are to be considered as being in the county budget by operation of law.

CONCLUSION

It is the opinion of this department that under the provisions of Section 54.160, RSMo 1949, the treasurer of a third class county is the custodian of all moneys for school purposes, belonging to the different districts of his county until paid out in the manner provided by said section. There being no provisions in this or any other section of the statutes authorizing payment of compensation; the treasurer is required to perform such duties gratuitously, and cannot be paid compensation of any kind for his services.

It is the further opinion of this department that a clerk of a third class county who was entitled to retain, but failed to retain fees for extension of taxes on the assessors books for 1947 and 1948, which fees were allowed in addition to his salary, under the provisions of what is now Section 51.400 RSMo 1949, and who received his statutory salary for these years, received less compensation for his services in those years than that to which he was legally entitled. By accepting the lesser compensation he is not precluded from requesting payment of the proportional part of the fees earned in 1947-1948, for which the county is obligated, in subsequent years.

Although the County Budget Law requires the budgeting of every proposed item of expenditure, the salaries of county officers are fixed by the legislature and are really a part of the county budget whether or not they have actually been included therein, under the rule announced in the case of Gill v. Buchanan County, supra. That while the court in its opinion specifically referred to salaries, the fees of county officers are fixed by the legislature and the ruling in that case is also applicable to the fees of such officers as well as all other expenditures provided for by the legislature, and that such fees are automatically included in the budget by operation of law regardless of whether or not they have actually been included in the budget as written. That if upon presentation of a claim for the fees, and that if


J. Hal Moore

the county court finds the claim to be in the correct amount and the services rendered as claimed, it shall be the duty of the court to order said amount paid from available funds of the county.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

PNC:hr

SCHOOLS:

Two vacancies in a city, town, consolidated, or reorganized school district shall be filled by appointment by the county superintendent of schools; two vacancies in a county school board shall be filled by the remaining members.

May 10, 1951

5-10-51

FILED

63

Honorable Garner L. Moody
Prosecuting Attorney of
Wright County
Hartville, Missouri

Dear Sir:

Reference is made to your letter of April 5, 1951, requesting an opinion of this department which reads as follows:

"The question has come up in this county as to who should appoint two new members of a six member school board where two members have resigned.

"We are not agreed as to whether the County School Superintendent, or the remaining directors should make the appointment."

Section 165.317, RSMo 1949, dealing with six member boards of a city, town or consolidated district provides:

"The government and control of such town or city school district shall be vested in a board of education of six members, who shall hold their office for three years and until their successors are duly elected and qualified, and any vacancy occurring in said board shall be filled in the same manner and with like effect as vacancies occurring in boards of other school districts are required to be filled,
* * *."

Hon. Garner L. Moody

Section 165.217, RSMo 1949, provides:

"If a vacancy occurs in the office of director, by death, resignation, refusal to serve, repeated neglect of duty or removal from the district, the remaining directors shall, before transacting any official business, appoint some suitable person to fill such vacancy; but should they be unable to agree, or should there be more than one vacancy at any one time, the county superintendent of public schools shall, upon notice of such vacancy or vacancies being filed with him in writing, immediately fill the same by appointment, and notify said person or persons in writing of such appointment; and the person or persons appointed under the provisions of this section shall comply with the requirements of section 165.210, and shall serve until the next annual school meeting."

(Underscoring ours.)

Therefore if the school board to which you have reference is a city, town or consolidated school board, the two vacancies would be filled by the county superintendent of schools.

Section 165.657, RSMo 1949, provides for a six member county board of education. Section 165.667, RSMo 1949, dealing with vacancies of such county board provides:

"Four members of the board shall constitute a quorum. Any member who is absent from board meetings two or more consecutive times without majority approval of the board, or who changes his residence to another county court district, or any member, except those elected at large, who changes his residence to a municipal township or school district in which another member of the board resides, shall be disqualified as a member of the board. If one or two vacancies occur in the membership of the county board of education the remaining members shall before transacting any official business, appoint one or two qualified persons to fill such vacancies until the next annual meeting for the election of the members of the county board of education. In the event the board should be unable to agree in filling a vacancy or there should be more

Hon. Garner L. Moody

than two vacancies at any one time, the county court, upon notice from the secretary of the board of such vacancy or vacancies, shall immediately fill the same by appointment and shall notify said person or persons in writing of such appointment and the person or persons so appointed shall serve until the second Tuesday in April of the following year, when their successors shall be elected for the unexpired term."

It is noted that here the legislature has constituted four members of such board a quorum. Therefore, if the board which you have reference to is a county board, such vacancies may be filled by the remaining four members.

Section 165.687, RSMo 1949, provides for a six member board for a reorganized district. This section in part provides:

"* * *The directors above provided shall be governed by the laws applicable to six-director school districts."

Therefore, with reference back to Section 165.217, RSMo 1949, which is made applicable to six member boards by Section 165.317, RSMo 1949, two vacancies existing in a reorganized district board would be filled by the county superintendent of schools.


CONCLUSION

Therefore it is the opinion of this department that two vacancies existing in a city town, consolidated, or reorganized school district board shall be filled by appointment by the county superintendent of schools and two vacancies existing in a six member county board shall be filled by the remaining members.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

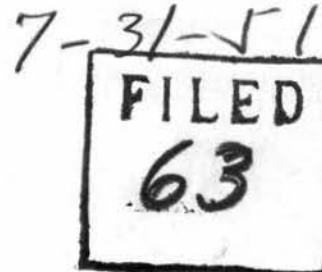
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SHERIFFS:
COUNTY COURT:

County Court authorized to pay sheriff mileage expense incurred in criminal case at the end of each month.

July 25, 1951.

Honorable Weldon W. Moore,
Prosecuting Attorney,
Texas County,
Houston, Mo.



Dear Sir:

This will acknowledge receipt of your letter of recent date requesting an opinion from this office on the following question:

"I should like your opinion as to the time the County Court should pay criminal mileage to the Sheriff. The Court desires to know if criminal mileage should be made to the Sheriff at the end of each month or if it should be paid upon consummation of the case."

Your attention is directed to sections 57.430 and 57.440, RSMo 1949, dealing with the payment of salaries and travel allowances to sheriff and reading as follows:

"In addition to the salary provided in sections 57.390 and 57.400, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed five cents per mile."

"All salaries provided in sections 57.390 and 57.400 shall be paid out of the county treasury in monthly installments at the end of each month by warrant drawn by the county court upon the county treasury. Claims for reimbursement for travel shall be submitted to the county court monthly and paid at the end of the month by warrant drawn on the county treasury by the county court."

Under these sections it appears to have been the intention of the legislature that the salary and travel expense of sheriffs in the various counties should be paid monthly. From a reading of these sections it does not appear to have been the intention of the

Honorable Weldon W. Moore.

legislature that a sheriff should not be paid mileage allowance due him in criminal cases until after a case was consummated.


CONCLUSION.

It is, therefore, the opinion of this office that the county court is authorized to pay mileage expense accruing to the sheriff in criminal cases at the end of each month, and the county court is not authorized to withhold payment of such mileage expense until the consummation of a pending case, if a valid claim for mileage expense is submitted by the sheriff.

Respectfully submitted,

JOHN E. MILLS,
Assistant Attorney-General.

APPROVED:



J. E. TAYLOR
Attorney General.

JEM/ld

JAIL BREAKING:

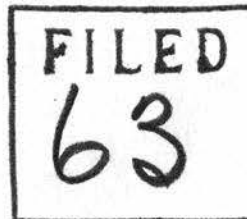
CITY ORDINANCE:

A city ordinance is not a penal statute, and, therefore, a person may not be tried for violating Section 557.390, RSMo 1949, when he escapes after being arrested by the city police and lodged in the city jail for a violation of a city ordinance.

September 6, 1951

9-6-51

Honorable Weldon W. Moore
Prosecuting Attorney
Texas County
Houston, Missouri



Dear Mr. Moore:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"I should like to know if a person may be tried under Section 557.390, MRS 1949, when he was taken into custody by the city police of a fourth (4th) class city and lodged in the city jail for a violation of a city ordinance pertaining to careless and reckless driving.

"There was also a warrant for the arrest of this subject on a state charge but the city police did not know of this charge at the time of the arrest for a violation of the city ordinance."

Section 557.390, RSMo 1949, is as follows:

"If any person lawfully imprisoned or detained in any county jail or other place of imprisonment, or in the custody of any officer, upon any criminal charge, before conviction, for the violation of any penal statute, shall break such prison or custody and escape therefrom, he shall, upon conviction, be punished by imprisonment in the penitentiary for a term not exceeding two years, or in a county jail not less than six months."

Honorable Weldon W. Moore

This statute is most comprehensive insofar as the general laws of the state are concerned. But a city ordinance is not a penal statute within the meaning of the laws of Missouri. The courts have consistently held to this view.

The Supreme Court in the case of St. Louis v. Tielkemeyer, 226 Mo. 130, 1.c. 140, said:

"When we are considering the question of the validity of this ordinance in the light of the State statute we must keep in mind the essential difference between the two acts. The State has authority to declare an act to be a crime, the city has no such authority.

"In City of Kansas v. Clark, 68 Mo. 588, it was held that a prosecution under a city ordinance for keeping a gambling table contrary to the ordinance was not a prosecution for a crime, but a civil suit to recover a penalty, the court saying: 'Nor do we regard the violation of the ordinance under consideration as a crime, since "a crime . . . is an act committed in violation of a public law" (4 Black., Com., 5); a law coextensive with the boundaries of the State which enacts it. Such a definition is obviously inapplicable to a mere local law or ordinance, passed in pursuance of, and in subordination to, the general or public law, for the promotion and preservation of peace and good order in a particular locality, and enforced by the collection of a pecuniary penalty.' That language was quoted and followed as the correct rule of law in State v. Muir, 164 Mo. 610, in which it was held that a conviction under a city ordinance against gaming was not a bar to a subsequent prosecution for the same act under the State statute; in that case the court said that the prosecution under the city ordinance was a civil action, and quoted Cooley's Const. Lim. (6 Ed.), p. 239, to sustain the doctrine.

* * *

Honorable Weldon W. Moore

The Supreme Court in the case of State v. Mills, 272 Mo. 526, l.c. 537, said:

"We are of the opinion that neither by our decisions, nor by statute, is a conviction for vagrancy in a city court 'a criminal offense' within the purview of the above quoted statute. For while the procedure, or some of it, in a prosecution for the violation of a town or city ordinance is criminal in form, that is, it follows the forms of the criminal procedure, we have nevertheless uniformly held that it is but a civil action to recover a debt or penalty due the city for the infraction of its ordinances. [St. Louis v. Tielkemeyer, 226 Mo. l.c. 141; State v. Muir, 164 Mo. 610.]"


CONCLUSION

It is the opinion of this office that a city ordinance is not a penal statute within the meaning of the law, and, therefore, a person may not be tried for the crime of jail breaking under Section 557.390, RSMo 1949, when he escapes after being arrested by the city police of a fourth class city and lodged in the city jail for a violation of a city ordinance.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:

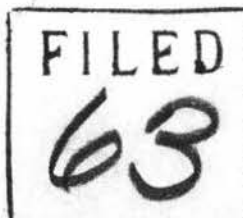


J. E. TAYLOR
Attorney General

BAT:ba

MOTOR VEHICLES: When person operating motor vehicle on the
Licenses: highways of the state makes a delinquent
MISDEMEANORS: registration, he is subject to penalty fee
REGISTRATION: of \$2.00 and is also guilty of misdemeanor
CRIMINAL LAW: under Section 301.440, RSMo 1949.

September 20, 1951



9-24-51

Honorable J. Hal Moore
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"There is a question in my mind in regard to Revised Statute 1949, chapter 301. I cannot find in this chapter or in any other chapter whether or not it is against the law in the State of Missouri to operate a motor vehicle after your license has expired. It seems that the only punishment provided is a \$2.00 late registration fee and that a person cannot be convicted for driving with improper license when the license are only delinquent."

Section 301.020, RSMo 1949, provides in part as follows:

"Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, except as herein otherwise expressly provided, shall file, by mail or otherwise, in the office of the director of revenue, an application for registration on a blank to be furnished by the director of revenue for that purpose, * * *"

September 20, 1951

Section 301.050, RSMo 1949, provides in part as follows:

" * * * After June 1, 1950, a penalty fee of two dollars shall be paid on all delinquent registrations."

Subsection 5 of Section 301.130, RSMo 1949, provides in part as follows:

"Before being operated on any highway of this state every motor vehicle or trailer shall have displayed the permanent license plates or temporary permit issued by the director or revenue entirely unobscured, unobstructed, all parts thereof plainly visible and kept reasonably clean, and so fastened as not to swing."

Section 301.440, RSMo 1949, provides as follows:

"Any person who violates any provision of this chapter for which no specific punishment is provided, shall upon conviction thereof be punished by a fine of not less than five dollars or more than five hundred dollars or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

It is clear that the penalty fee of two dollars, found in Section 301.050, refers only to the registration and is directed against any person who does not make his application for registration at the proper time.

It does not purport to be a penalty or punishment for the operation of a motor vehicle or trailer on the highways of this state, which motor vehicle or trailer does not have displayed the permanent license plates or temporary permit issued by the Director of Revenue.

Since no specific punishment has been provided for violations of subsection 5 of Section 301.130, the provisions of Section 301.440 would be applicable where a motor vehicle is operated on the highways of this state without displaying the permanent license plates or temporary permit issued by the Director of Revenue.

Honorable J. Hal Moore

September 20, 1951

Subsection 2 of Section 301.130, RSMo 1949, provides as follows:

"When application is made for reregistration of a motor vehicle the director of revenue shall, except as otherwise provided, mail or deliver a metal tab or other durable material designating the year of registration, which tab shall be attached to the license plate in the place provided therefor."

We believe from the provisions of this subsection that the permanent license plates contemplated by subsection 5 of Section 301.130, are the metal plates assigned by the Director of Revenue to each motor vehicle or trailer, together with the metal tab designating the particular year of registration. The tab is as much a part of the license plate as are the numbers on such plate. Therefore, subsection 5 of Section 301.130 is violated if permanent registration plates, including the metal tabs designating the year of registration, or temporary permit, are not displayed on every motor vehicle operated on any highway of this state, and the violation may be punished as provided in Section 301.440.

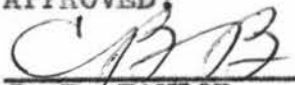
CONCLUSION

It is the opinion of this department that every owner of a motor vehicle operated or driven upon the highways of this state must pay a penalty fee of two dollars if he is delinquent in his registration of such motor vehicle or trailer.

It is the further opinion of this department that any person who operates on any highway of this state a motor vehicle or trailer which does not have displayed the permanent license plates or temporary permit issued by the Director of Revenue may be punished upon conviction thereof by a fine of not less than five dollars or more than five hundred dollars or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment.

Respectfully submitted,

APPROVED:


J. E. TAYLOR
Attorney General
CBB:lrt

C. B. BURNS, JR.
Assistant Attorney General

INTOXICATING LIQUOR:

Section 311.290, RSMo 1949, does not prohibit the sale of intoxicating liquors on election days concerning the Production and Marketing Administration.



December 10, 1951

12-14-51

Honorable Garner L. Moody
Prosecuting Attorney of
Wright County
Hartville, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this department which request reads as follows:

"I am writing for an opinion as to the sale of intoxicants on election days concerning the P. M. A. (Production and Marketing Administration)."

Section 311.290, RSMo 1949, restricts the sale of intoxicating liquor on an election day as follows:

"No person having a license under the provisions of this law shall sell, give away or otherwise dispose of or suffer the same to be done upon or about his premises, any intoxicating liquor in any quantity between the hours of 1:30 A.M., and 6:00 A.M. on week days and between the hours of twelve o'clock midnight Saturday and twelve o'clock midnight Sunday, or upon the day of any general, special or primary election in this state, or upon any county, township, city, town or municipal election day, and if said person

has a license to sell intoxicating liquor by the drink his premises shall be and remain a closed place as defined in this section upon the day of any general, special or primary election in this state or upon any county, township, city, town or municipal election day and between the hours of 1:30 A.M. and 6:00 A.M. on week days and twelve o'clock midnight Saturday and twelve o'clock midnight on Sunday; provided, that the sale of intoxicating liquor may be resumed and the premises reopened on any such election day after the expiration of thirty minutes next following the hour or time fixed by law for the closing of the polls at any such election; and provided further, that where such licenses authorizing the sale of intoxicating liquor by the drink are held by clubs or hotels this section shall apply only to the room or rooms in which intoxicating liquor is dispensed; and, provided further, that where such licenses are held by restaurants whose business is conducted in one room only and substantial quantities of food and merchandise, other than intoxicating liquors are dispensed, then the licensee shall keep securely locked during the hours and on the days herein specified all refrigerators, cabinets, cases, boxes and taps from which intoxicating liquor is dispensed. A 'closed place' is defined to mean a place where all doors are locked and where no patrons are in the place or about the premises. Any person violating any provision of this section shall be deemed guilty of a misdemeanor."

This section by its express terms applies to state, general, special or primary election or any county, township, city, town or municipal election. The elections which you have referred to are for the purpose of electing a Production and Marketing Administration community and county committee. The regulations governing such elections are found in 3 F.R. 1885, as amended.

Honorable Garner L. Moody

Section 713.5 provides who shall be eligible to vote at such elections as follows:

"Any farmer who has an interest in a farm as owner, tenant or sharecropper shall be eligible to vote for committeemen and delegates in the community in which he has such an interest if:

"(a) A payment or grant of conservation materials or services is or will be made with respect to the farm under the current Agricultural Conservation Program, or such payment or grant has been made under the program during any one of the preceding three years and there is being carried out on the farm one or more of the current program practices approved for the State by the State Production and Marketing Administration committee, hereinafter referred to as the 'State committee';

"(b) Such a farmer is eligible for a cooperator's loan or other price support;

"(c) Such a farmer is eligible for a payment under the Sugar Act program; or

"(d) Such farmer has a crop insurance contract with the Federal Crop Insurance Corporation."

Section 713.3 provides that the purpose of such committees shall be as follows:

"The purpose of the county and community committee shall be to administer, on behalf of the Secretary of Agriculture of the United States, hereinafter referred to as the 'Secretary of Agriculture,' and in accordance with applicable laws, regulations, and official instructions, the provisions of section 7 to 17 inclusive of the Soil Conservation and Domestic Allotment Act, the Agricultural Adjustment Act of 1938, the Federal Crop Insurance Act, the Sugar Act of 1948, and any

Honorable Garner L. Moody

amendments to such acts, and such other acts of Congress as the Secretary of Agriculture or the Congress may designate. The county and community committees shall not engage in any other activity."

It is quite obvious that such an election is not a state, general, special or primary election nor is it a county, township, city, town or municipal election. Such an election only involves production marketing association and is not a state, county township or municipal function.

CONCLUSION

Therefore, it is the opinion of this department that Section 311.290, RSMo 1949, does not prohibit the sale of intoxicating liquors on election days concerning the Production and Marketing Administration.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

COUNTY OFFICERS) The compensation of a county officer cannot
) be increased during his term of office.

February 19, 1951



Mr. R. E. Moulthrop
Prosecuting Attorney
Harrison County
Bethany, Missouri

Dear Sir:

We are in receipt of your recent request for an official opinion, which request is as follows:

"Harrison County is a county of the third class and has the township form of county government. The Treasurer is also ex-officio Collector, and through the year 1950, and until this date, has collected the sum of 2% on all corporation taxes, back taxes, licenses, merchant's tax and tax on railroads. Under Section 13,993, Laws of 1949, such commission was properly 3%. Is the County Court now authorized to pay such ex-officio Collector the amount to which the office would have been entitled, namely an additional 1%. Also, does such provision constitute an increase and prevent thereof to the present ex-officio Collector during such officer's current term."

Section 54.320, RSMo 1949, relating to your problem, reads as follows:

"The county treasurer in counties of the third class adopting township organization shall be allowed a salary of not less than one hundred dollars per month by the county

Mr. R. E. Moulthrop

court to be paid as at present provided by law; the ex officio collector for collecting and paying over the same shall be allowed a commission of three per cent on all corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, and two per cent on all delinquent taxes, which shall be taxed as costs against such delinquents and collected as other taxes; provided, he shall receive nothing for paying over money to his successor in office."

This statute replaces Section 13993, R. S. Mo. 1939, which was amended in 1949, Laws of Missouri, 1949, page 626. The change made at that time simply increased the commission allowed the county treasurer (ex officio collector) from two per cent to three per cent for collecting and paying over the tax items enumerated in your letter. The act was approved April 26, 1949.

Section 13 of Article VII of the Constitution of Missouri, reads as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

In substance this is the same as Section 8 of Article XIV of the Constitution of 1875. It applies to all officers who are elected or appointed for a definite term of office and whose compensation has been fixed by law. State ex rel. Stevenson v. Smith, 87 Mo. 158; Callaway County v. Henderson, 119 Mo. 32, 24 S.W. 437. The term "compensation" as used in this section is broad enough to include salary, commissions, fees and other pay for public service. State ex rel. Emmons v. Farmer, 271 Mo. 306, 196 S.W. 1106.

In State ex rel. Selleck v. Gordon, 254 Mo. 471, 162 S.W. 629, the Supreme Court of Missouri held that a sheriff was not entitled to fees authorized by the legislature after he had begun his term of office. In the course of that opinion the court said:

Mr. R. E. Moulthrop

"The only items of costs contained in said fee bill which are attacked on the ground that they are illegal and not properly taxable as items of cost in the cause are the two items of \$11 and \$12.25, claimed by sheriff Roland as fees for mileage in subpoenaing witnesses. Sheriff Roland's four-year term of office began about January 1, 1909. The statute authorizing sheriffs to receive fees for mileage in subpoenaing witnesses in criminal cases was first enacted in 1909 and after Sheriff Roland had begun his term of office (Laws 1909, p. 505.) The sheriff was therefore not entitled to these fees for the reason that, if allowed, they would amount to an increase of his fees during his term of office."

It is evident that the act of 1949, increasing from two per cent to three per cent the commission of the county treasurer (ex-officio collector) in third class counties on certain tax collections, cannot be applied until the end of the current term of said officers, at which time the act will become effective.

CONCLUSION

It is the opinion of this department that the county court of Harrison County is not authorized to pay the county treasurer (ex officio collector) the additional one per cent for collecting and paying over corporation taxes, back taxes, licenses, merchants' tax and tax on railroads. His compensation cannot be increased during his present term of office.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

INHERITANCE TAXES:
EXPENDITURES FOR LEGAL
SERVICES A DEDUCTION
AGAINST, WHEN:

Under Sec. 465.100 RSMo 1949, reasonable value of necessary legal services furnished to the administrator to be allowed; are administration expenses and deductible against inheritance taxes. Also reasonable value of services of additional attorneys secured by heirs to assist administrator's attorney where such services were necessary and beneficial to estate to be allowed and paid from estate funds; are administration expenses, and deductible against inheritance taxes.

March 22, 1951

Mr. R. E. Moulthrop
Prosecuting Attorney
Harrison County
Bethany, Missouri



Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads as follows:

"The following question has arisen incident to the appraisal of an estate for inheritance tax purposes, upon which, an opinion from your office is desirable.

"Where a claim is filed against the estate of a decedent for services rendered the decedent during his lifetime, the Administrator through regularly employed counsel for the estate proceeds to resist the claim through ensuing litigation and all heirs join in the employment of additional counsel to assist in the resistance of the claim. Are fees paid such additional attorneys properly chargeable as expenses and deductible as such as against inheritance taxes?"

In those instances when an action is brought by the executor or administrator, or when it is necessary for him to defend any action brought against him, in which the estate is involved, the probate court by its order may allow a reasonable amount for legal services rendered to the executor or administrator in the settlement of his accounts, as provided by Section 465.100, RSMo 1949, as follows:

Mr. R. E. Moulthrop

"In all settlements of executors or administrators the court shall settle the same according to law, allow all disbursements and appropriations made by order of the court, and all reasonable charges for funeral expenses, leasing real estate, legal advice and service, and collecting and preserving the estate, * * *."

Reasonable amounts thus expended for attorney fees have long been held to be administration costs by the courts of this state, and we believe the decision in the early case of Crow v. Lutz, 175 Mo. App. 427, states the general rule with reference to legal services. In commenting on attorney fees for services furnished an administrator, the court at l. c. 434 said:

"On the contrary, our statute provides and our courts hold that such claims are expenses of administration and, if reasonable, must be allowed by the probate court. Our statute clothes the probate court with power to directly allow such a claim and order its payment out of the assets of the estate. (State ex rel. v. Walsh, 67 Mo. App. 348.)"

It appears that some qualification was made to this rule in the later case of In re Estate of Thomasson, 350 Mo. 1157, in which the court stated:

"This ruling in the Matson case was partly right and partly wrong, in our opinion. The holding that a claim for attorney fee for services rendered an estate is an expense of administration, is correct, with qualifications. As more fully explained in Nichols v. Reyburn, 55 Mo. App. 1, 5, the attorney contracts on the credit of both the administrator and the estate. The administrator making the contract is personally bound by its terms; the estate, only insofar as the services are necessary or beneficial and the charges reasonable. * * *"

From the facts given in your letter the administrator employed an attorney to represent him in his defense to an action involving a claim against the estate, and subsequently thereto additional attorneys to assist the administrator's attorney were employed by the heirs of decedent.

Mr. R. E. Moulthrop

While the statement of facts does not indicate whether there was any necessity for the additional legal services, whether same was for the benefit of the whole estate, or merely beneficial to the heirs, and also whether the fees to be charged therefor were reasonable. It does appear that the expense of such additional legal services has already been paid although the source of the payment is not given. The chief inquiry is whether the fees of the additional attorneys may be deducted against inheritance taxes which may be due against the estate.

The employment of additional counsel was by all of decedent's heirs without the apparent knowledge, or consent of the administrator.

Ordinarily, attorneys employed by a person other than the administrator, under circumstances the same or similar to those given above, are the attorneys of the person employing them and not those of the administrator. It appears that the general rule in such matters has been well stated in Section 548, pages 688-9, Volume 21, American Jurisprudence, which is quoted as follows:

"The general rule is that no allowance may be made out of the estate of a deceased person for the services of an attorney not employed by the personal representative of the estate where the services were rendered for the sole benefit of an individual or group of individuals interested in the estate. In some jurisdictions, this rule has been applied, although the services were incidentally beneficial to the estate. In other jurisdictions, however, allowances have been made for the services of attorneys thus employed by persons other than the personal representative, where the services benefited all persons interested in the estate and were beneficial to it. In accordance with the general rule, no allowance may be made out of an estate for fees of attorneys for services rendered to any individual claiming as a beneficiary of the estate, for his sole benefit, although an allowance may be made for services of attorneys for persons claiming as beneficiaries where those services are beneficial to the whole estate. * * *

In view of the foregoing, it is our thought that since it does not appear that the additional legal services were necessary or the expense of same is reasonable, and that such services were contracted voluntarily by the heirs, and not by the administrator in

Mr. R. E. Moulthrop

his effort to preserve the estate property, and in view of the fact that the administrator had previously secured legal counsel to represent him in an action filed against him in his official capacity and involving a claim against the estate, it is assumed that the attorneys were those of the heirs and not the administrator, and that the additional legal services were for their benefit in protecting their respective interests in the estate, and were not beneficial to the whole estate; that the court may not allow a claim for the payment of such services and order same paid from estate funds, as a reasonable expenditure for legal services within the meaning of Section 465.100, supra, and that the cost of additional legal services cannot be classified as administration expenses.

The conclusion reached in the preceding paragraph was the result of the assumption of certain facts therein stated, but in the event our assumption is wrong, then we hasten to add that the conclusion reached is not applicable, and that the conclusion would be different if the true facts of the case are also different from those assumed.

The general rule given above that no allowance may be made from a deceased person's estate for an attorney's services when the attorney was employed by someone other than the personal representative, where the services rendered were for the benefit of an individual interested in the estate, like other general rules has exceptions, to some of which we desire to call attention.

One of the most notable exceptions being in those instances where an heir employs an attorney to protect his own interests in the estate, but that from the nature of the services rendered they are not merely beneficial to the individual interest of the heir, but are beneficial to the whole estate as well. Under such circumstances the reasonable value of the legal services should be allowed and paid from the funds of the estate, and in the case of *In re Hirsch's Estate*, 278 N. Y. S. 255, such a payment from the estate was held to be proper. In discussing the matter, the court said at l. c. 257:

"It is well established that, where the services of the attorney have resulted in benefit to the estate as a whole, the payment to him should be made from the entire fund and not merely from the distributive interest of the person on behalf of whom he primarily acted. * * *"

Again, it appears that another notable exception to the general rule given above, exists in those instances in which additional

Mr. R. E. Moulthrop

counsel has been secured to assist an attorney in litigation involving estate property. Although the services were of benefit to the heirs in protecting their individual interests, yet where the additional legal services were beneficial to the whole estate, the reasonable value of such services should be allowed and paid from estate funds. This in effect was the holding in the case of *In re Schwint's Estate*, 183 Okla. 439, the applicable portion of the court's opinion being found at l. c. 441, and which reads as follows:

"The general rule is that the employment of an attorney by an heir or legatee will not of itself create a liability on the part of the estate for the fees of such attorney. * * * But where the services of the attorney employed by some of the heirs or legatees are beneficial to the estate, as a whole, the court may, if the facts justify it, allow out of the estate a reasonable fee for such services. * * * In some of the cited cases the proceedings were against the representative of the estate and were beneficial to the entire estate. However, we think the principle is the same in those cases as in this case, where the services are for assisting the attorney employed by the representative and are found to be beneficial to the estate. Here both the county court and the district court found that defendants in error performed services which benefited the estate as a whole, and the plaintiffs in error do not question the correctness of that finding. * * *

Therefore, it is our further thought that in the event the facts assumed above do not exist, but if the true facts are that although the attorneys employed by the heirs to assist the attorney previously employed by the administrator in resisting an action involving a claim against the estate was for the benefit of the heirs, and the services were beneficial to the whole estate, such services were necessary to the whole estate, and the cost of the services were reasonable, then the probate court may allow a claim for such reasonable services and order same paid from the estate funds under the provisions of Section 465.100, supra, and in that event the additional legal services would constitute administration expenses.

The specific inquiry in the opinion request, which we repeat here is:

Mr. R. E. Moulthrop

"Are fees paid such additional attorneys properly chargeable as expenses and deductible as such as against inheritance tax?"

Since we have discussed the first part of the inquiry, and in view of our assumption of the existence of certain facts and have ruled that the fees of the additional attorneys were not and could not be classified as administration expenses; or in the alternative the reasonable cost of additional legal services might properly be allowed and paid from estate funds in the same manner as the law provides that other administration expenses may be allowed and paid, under the circumstances mentioned above, we turn now to the discussion of the latter part of the inquiry, namely, whether such fees are deductible against inheritance taxes, which may be assessed against the estate.

This inquiry necessarily calls for a consideration of the Missouri inheritance tax laws and how the amount of the tax is to be determined. The statutes which provide the necessary procedure to be followed in levying state inheritance taxes are to be found in Chapter 145, entitled "Inheritance Tax" of the RSMo 1949. These statutes are quite voluminous, and we find it impractical to quote all of them in a short opinion of this kind, but merely refer to them here in passing. It also appears that such matters have been ably discussed in several opinions of the courts, to which we desire to call attention.

In the case of *Bernays v. Major*, 344 Mo. 135, 1. c. 140, the court said:

"The tax in question is a tax on the right to receive property rather than on the right to transfer property after death. (In re *Rosing's Estate*, 337 Mo. 544, 85 S.W. (2d) 495; *Brown v. State*, 323 Mo. 138, 19 S. W. (2d) 12.) * * *."

In the case of *In re Rosing's Estate*, supra, in discussing the nature of inheritance taxes, the court at 1. c. 547 said:

"* * *An inheritance tax in its common form is however an excise tax on the privilege of taking property by will or by inheritance or by succession in any other form upon the death of the owner, and in such case is imposed upon each legacy or distributive share of the estate as it is received. Such tax is called a legacy or succession tax. (26 R. C. L. sec. 166 p. 195.)"

Mr. R. E. Moulthrop

The statutes do not specifically provide what deductions are to be made from the gross estate in arriving at the net-base value of the same, from which the amount of inheritance taxes are to be determined, and the court so held in the case of *In re McKinney's Estate*, 351 Mo. 718, at l. c. 721, as follows:

"Under our statutes the legislative formula for determining the property subject to the tax is the net or 'clear market' value of all property actually coming into the possession and enjoyment of the intended beneficiary. Mo. R. S. A., Secs. 571-574; *In re Rosing*, supra; *In re Costello*, supra. There is no express statutory provision for deductions and so what may or may not be deducted from the gross estate in arriving at the base for the tax is left to construction and interpretation subject to the statutory limitation of the clear market value of all property actually coming into the possession and enjoyment of the recipients. * * *

In this case the court held that in arriving at the clear net market value of the estate subject to payment of inheritance taxes, the fees of a trustee of a trust created by the will of deceased should have been considered as a deduction.

While the statutes or court decisions of Missouri do not specifically hold that administration expenses are deductible against inheritance taxes, it appears that such expenses should be deductible, and in other states where the inheritance tax laws are similar to those of Missouri, such expenses have been held to be deductible.

In the case of *In re Matter of Gihon*, 169 New York Reports, page 443, in discussing the deductibility of administration expenses from state inheritance taxes, the court said at l. c. 445:

"This appeal presents for determination the propriety of the deduction of three certain items in assessment of the value of the testator's estate for the purpose of the imposition of a transfer tax. The probate of the will was contested and in the proceedings arising on such a contest a temporary administrator was appointed. The amount of his fees and disbursements was deducted from the value of the estate. The appellant challenges the correctness of this allowance. We think the

deduction was properly made. It was an expense of administration, and, therefore, chargeable to the estate, and not to the legatees or devisees. The transfer tax imposed by the laws of this State is a tax, not on the property of the estate, but on the succession by the legatee, devisee, next of kin or heirs at law to the fortune of the deceased. Personal property does not pass directly from the deceased to his legatee or next of kin, but all that such legatee or next of kin takes is what may be coming to him from the estate on its distribution after settlement. The amount represented by the expenditures of the administrator or the expense of administration never passes to the legatee or next of kin, and, therefore, is not subject to the tax. * * *

Again in the case of State ex rel. v. Probate Court, 101 Minnesota, 485, at l. c. 487, the court said:

"* * *The expenses of the administration of the estate of a deceased person are proper to be deducted in ascertaining the value of the estate for the purposes of taxation under the inheritance tax law. * * * The expenses of administration are imposed as a matter of law, and are caused by the use of the legal machinery provided by the state to wind up the affairs of deceased persons, and cannot ordinarily be avoided; hence it is just that they should be deducted from the valuation of the estate. * * *

The provisions of the inheritance tax laws of the states of New York and Minnesota appear to be similar to those of Missouri in that the tax is to be determined from the net value of the estate rather than from the gross value of same. In those states, as well as in Missouri, certain deductions are allowable in arriving at the net value of the estate. In the former states administration expenses have been held to be a lawful deduction, but the decisions in Missouri have not so declared. However, in view of the fact that the tax is to be levied on the actual net value of the property coming into the possession or enjoyment of the beneficiaries it is our thought that administration expenses are properly deductible under Missouri law, for the reasons given in the quoted portion of above opinions.

Mr. R. E. Moulthrop

The expense of additional attorneys employed by the heirs under the facts assumed above, were held not to constitute administration expenses, and it is our further opinion that such expenses cannot legally be deducted from the gross value of the estate for the purpose of arriving at the net value of such property subject to payment of the state inheritance taxes. However, in the event such assumption is contrary to the true facts, then under such circumstances, and for the reasons given above, the additional attorneys' fees may be allowed and paid from the estate funds in the same manner as the law provides for the payment of other administration expenses, and may also be deducted against state inheritance taxes which are due from said estate.

CONCLUSION

It is therefore the opinion of this department that an administrator who employs an attorney to represent him in his defense to a legal action involving a claim against the estate, is, under the provisions of Section 465.100, RSMo 1949, entitled to credit in the settlement of his accounts for the reasonable amount or value of such legal services, which amount is to be allowed and ordered paid from estate funds, by the court. That such reasonable amount spent for legal services is an administration expense and is deductible from the gross value of the estate in arriving at the clear net value of same for the purpose of determining the amount of state inheritance taxes due thereon.

It is the further opinion of this department that in the instance referred to above, and where it is assumed that all the heirs of deceased, apparently without the knowledge or consent of the administrator employed additional attorneys to assist the attorney previously employed by the administrator in his defense to an action involving a claim against the estate, that such additional legal services were for the benefit of the heirs in their effort to protect their respective interests in the estate, and not for the benefit of the estate as a whole. There not being any apparent necessity or benefit to the whole estate for such additional legal services, and which were not furnished to the administrator, but to the heirs, the court cannot allow a claim for said services as a reasonable amount spent for attorneys' fees within the meaning of Section 465.100, and cannot allow same paid from estate funds. That such amount cannot legally be classified as administration expenses and does not constitute a deduction within the meaning of the inheritance tax laws of Missouri.

However, where the facts are different from those assumed, and it is true that although the additional legal services were


Mr. R. E. Moulthrop

secured by all the heirs of decedent, primarily to protect their respective interests in the estate, yet, where the services were necessary and beneficial to the whole estate, and the amount of fees claimed for such services is reasonable, the court may allow same and order such amount paid from the funds of the estate under the provisions of Section 465.100, supra. That such reasonable amount expended for additional attorney's fees is an administration expense and may properly be deducted as such against state inheritance taxes.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

PNC:hr

SCHOOL DISTRICTS:
ANNEXATION:

Portion of a consolidated school district may be annexed to another district after a vote of the voters of the whole of the district sought to be annexed favoring the release of the portion sought to be annexed and after acceptance by the school board of the proposed annexed district.

May 16, 1951

Honorable R. E. Moulthrop
Prosecuting Attorney
Harrison County
Bethany, Missouri



Dear Mr. Moulthrop:

We have your letter in which you request an opinion of this department. Your letter is as follows:

"An opinion is respectfully requested from your office covering the following question:

"May a part only, of a consolidated school district organized under Senate Bill #307 -- 64th General Assembly, by vote, annex to another adjoining consolidated school district?

"If so, who may vote at such election-- the qualified voters of the whole district or only those who live in the part that is proposed to be annexed to the second district?"

Section 165.300, RSMo 1949, is as follows:

"1. Whenever an entire school district, or a part of a district, whether in either case it be a common school district, or a city, town or consolidated school district, which adjoins any city, town, consolidated or village school district, including districts in cities of seventy-five thousand to five hundred thousand inhabitants, desires to be attached thereto for school purposes, upon the reception of a petition setting forth such fact and signed by ten qualified voters of such district, the board of directors thereof shall order a special meeting or special election for said purpose by

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giving notice as required by section 165.200; provided, however, that after the holding of any such special election, no other such special election shall be called within a period of two years thereafter.

"2. Should a majority of the votes cast favor such annexation, the secretary shall certify the fact, with a copy of the record, to the board of said district and to the board of said city, town or village school district; whereupon the board of such city, town or village district shall meet to consider the advisability of receiving such territory, and should a majority of all the members of said board favor such annexation, the boundary lines of such city or town school district shall from that date be changed so as to include said territory and said board shall immediately notify the clerk of said district which has been annexed, in whole or in part, of its action.

"3. In case an entire district is thus annexed, all property and money on hand thereto belonging shall immediately pass into the possession of the board of said city or town school district; but should only a part of a district be annexed thereto, said part shall relinquish all claim and title to any part of the school property and money on hand belonging to said original district, and that portion of the district remaining must contain within its limits thirty children, and thirty thousand dollars assessed valuation, or thirty children and nine square miles of territory.

"4. The voting at said special school meeting or special election shall be by ballot, as provided for in section 165.267, in the case of common school districts, or as provided for in section 165.330 in the case of town, city or consolidated school districts, and the ballots shall be

"For annexation

Hon. R. E. Moulthrop

"and

"Against annexation,

"when the whole district is to be annexed,
but if only a part is to be annexed, the
ballots shall read

"For release

"and

"Against release." (Underscoring ours)

We are of the opinion that the above quoted section of the statute is applicable to the question involved in your opinion request. Said section provides that whenever a part of a school district, whether it be a common school district or a city, town, or consolidated school district adjoining any city, town, consolidated or village school district, desires to be attached to either a city, town or consolidated school district for school purposes and whenever the board of directors of the district, a portion of which district desires to be annexed to another consolidated district, shall receive a petition setting forth that fact relative to that district signed by ten qualified voters of said district said board shall order a special meeting or special election for the purpose of voting upon the question by giving notice as required by Section 165.200, RSMo 1949.

Said Section 165.200, supra, insofar as it applies to the giving of notice is as follows:

"* * * If no schoolhouse is located within the district, the place of meeting shall be designated by notices, posted in five public places within the district fifteen days previous to such annual meeting, or by notice for same length of time in all the newspapers published in the district, giving the time, place and purposes of such meeting."

The aforesaid section, 165.300, supra, first above quoted, in paragraph (2) thereof provides in substance that should a majority of the votes cast favor such annexation the secretary shall certify that fact, together with a copy of the record, to the district to which the portion proposed to be annexed

Hon. R. E. Moulthrop

is to be annexed, whereupon the board of said last mentioned district shall meet and consider the advisability of receiving such territory. The statute further provides in substance that should a majority of the members of said board favor such annexation the boundary of the district receiving the new territory shall from that date be changed so as to include said territory and that the board of the annexing district shall immediately notify the clerk of the district a portion of which has been annexed of its action.

Paragraph numbered (4) of said Section 165.300, above quoted, provides in substance for the conduct of the meeting and of the election in the district a part of which is to be annexed to another district and provides that in instances in which only a portion of the district is to be annexed to another district as distinguished from instances in which the whole district is to be annexed to another district the ballots upon which the voting is done shall read "for release" and "against release."

Certain questions may occur in connection with the consideration of the applicability of the above quoted section to the question embodied in your letter and we should therefore give some attention to a consideration of such questions. We preface this discussion of said questions with an expression of our opinion to the effect that a part only of a consolidated district organized under S.B. 307, 64th General Assembly which is the same as Section 165.657, RSMo 1949, may by vote annex to another adjoining consolidated school district. We are of this opinion because there is no language in said Section 165.300, supra, which excepts any school district in the state of Missouri which adjoins any city, town, consolidated or village school district or which excepts any part of such district from the provisions thereof.

We are also of the opinion that in any election on the question of release of a portion of any such district for the purpose of annexation to any city, town or consolidated school district all qualified voters of the district, a portion of which is to be annexed, are entitled to vote.

It will be noted that you limit your question to such consolidated school districts as were organized under Senate Bill No. 307, 64th General Assembly, which act is embodied in Sections 165.657 to 165.707, RSMo 1949, inclusive. The question may occur as to whether any district organized under said act is a consolidated district within the meaning of the term consolidated district as used in the Missouri statutes. We are of

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the opinion that in cases in which, under said act, districts have been formed which are composed of two or more preexisting districts, said districts are in fact consolidated districts because a consolidation has actually been accomplished. We believe that we are supported in this opinion by reason of the use of the word "consolidation" as a descriptive term in the act itself and more particularly in Section 165.697, RSMo 1949, which is part of said act which section is, in part, as follows:

"In all school districts enlarged under the provisions of sections 165.657 to 165.707, in which the erection of a new central school building or any addition to present building so selected by reason of consolidation is a part of the approved plan, state aid shall be provided in the amount of one-half of the cost of said building and equipment but the total state aid for this purpose shall not exceed twenty-five thousand dollars for any enlarged district. * * *" (Underscoring ours.)

The question may occur as to whether districts organized under said section have any different status than that of any other school district of this state insofar as the applicability of the provisions of the aforesaid Section 165.300 is concerned. In answer to that question we wish to state that we are of the opinion that the status of such districts is no different than that of any other school district in the state of Missouri insofar as the applicability of the provisions of Section 165.300 is concerned for the reason that said Section 165.657, supra, merely provides a new method of forming school districts which method sometimes amounts to consolidation of smaller districts and when a district is formed by said method and under said act it is a school district of the state of Missouri, and since Section 165.300, supra, applies to any school district of this state which happens to adjoin any city, town, consolidated or village school district or to any portion of any such district so adjoining any such district, it certainly applies to school districts organized under Senate Bill No. 307, 64th General Assembly, which act is embodied in Sections 165.657 to 165.707, RSMo 1949, inclusive. In further support of our opinion to the effect that Section 165.300, supra, is applicable to districts organized under Sections 165.657 to 165.707, RSMo 1949, inclusive, we point out that Section 165.707, RSMo 1949, which is a part of the reorganization act, provides as follows:

"Changes of boundary lines * * * of enlarged districts may be effected as now or hereafter provided by sections 165.263 to 165.373."

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We comment that Section 165.300, the section which we hold to be applicable to the districts which you have in mind, is one of the sections designated in Section 165.707, above quoted.

Another question which may arise in the construction of Section 165.300, supra, is whether or not the statute limits the districts to which other districts may be annexed to city, town or village school districts to the exclusion of an ordinary consolidated school district which is not a city, town or village school district. The reason that this question occurs is that in the beginning of said Section 165.300, supra, the types of districts to which another district or a portion thereof may be annexed are described as city, town, consolidated or village school districts. Whereas in paragraph numbered (2) of said section it is provided that should a majority of the votes be cast by the district, a part of which is to be annexed to the other district, in favor of annexation, the secretary shall certify the fact with a copy of the record to said city, town or village school district and fails to mention consolidated districts as one of the kinds of district to which such fact might be certified. We are of the opinion however that the mention of consolidated districts in the beginning of the section definitely shows that it was the intention of the Legislature that not only city, town or village districts but also ordinary consolidated districts could receive portions of other districts by annexation, and that the omission in paragraph (2) of the section of consolidated districts among those to whom notice of the outcome of the election in the other districts was to be given does not cast any doubt upon the intention shown by the first portion of the statute which definitely includes ordinary consolidated districts among those that may receive other districts or portions thereof by annexation. We believe that an intention on the part of the Legislature to the effect that the result of an election on the question of release of a portion of a district for the purpose of annexation to an adjacent consolidated district may be certified to the board of the said adjacent consolidated district may be inferred from the fact that consolidated districts were mentioned in the first part of the section as districts to which other districts or portions thereof may be annexed.

CONCLUSION

We are accordingly of the opinion that if a part only of a district organized under S.B. 307, 64th General Assembly, Section 165.657, RSMo 1949, desires to be annexed by an adjoining consolidated district and if ten qualified voters of the district, a

Hon. R. E. Moulthrop

portion of which district desires to be annexed, shall present a petition setting forth that fact to the board of directors of said district, said board of directors shall give notice of election, said notice to be given in the manner prescribed in Section 165.200, RSMo 1949, and if at such election the voters of the district vote to release the portion which desires to be annexed to another district and if the district to which it is desired for said portion to be annexed upon receipt of due notice of the fact of the vote for such release by the other district shall by vote of its board of directors vote for the acceptance of the new territory, the annexation of the portion of the school district desiring to be annexed by the consolidated district shall be an accepted fact.

In answer to your second question we are of the opinion that in the above mentioned election the voters of the entire district, a portion of which is to be released by one district and annexed by the other, have a right to vote on the question of release.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

SMW:ab

HOSPITALS: In order to qualify for State financial aid a County Memorial Hospital must be
COUNTY MEMORIAL: operated by the county and an amount
equivalent to the sum of money sought
HEALTH: in aid must be expended.

February 23, 1951

2-28-51

Honorable Walter L. Mulvania
Prosecuting Attorney
Atchison County
Rock Port, Missouri



Dear Mr. Mulvania:

This is in reply to your request for an opinion which is as follows:

"A question has been put to me in my representative capacity as County Attorney by members of the board of directors of the Fairfax Community Hospital, Inc., of Fairfax, Missouri, on the matter of the interpretation of Sections 184.290 and 184.300 of R.S. Mo. 1949.

"This hospital was organized as a private corporation to serve this county and surrounding area. Thereafter, a corporation was organized under the Educational and Charitable Act and known as the Community Hospital Association. The building which was constructed by the original corporation was leased to the latter corporation for operating purposes.

"The Board has been advised by members of the State Department of Health that the hospital could secure the state aid as provided in Section 184.290 by changing the name of the corporation to that of County Memorial Hospital. The question, therefore, is whether or not this hospital which has already been erected and is now in operation can qualify for the state financial aid allocated to a

Honorable Walter L. Mulvania.

county eligible for it under this and the following section, and further, inqualifying for the aid, whether the county, as such, must expend at least that amount in connection with the purchase or erection of said hospital. As previously stated, members of this board were advised that, inasmuch as the hospital had already been erected, it would not be necessary for the county to match the amount of the state aid.

"I am interested in the correct interpretation of this new statute in properly advising the county court in the event there is a change of the name of the corporation, and as to the financial obligations of the county thereafter in supporting the hospital in the event that it became a county memorial hospital.

"Thanking you for any opinion you may render to me on this matter, I am"

Your opinion request in reality contains three separate questions and we divide it for convenience and clarity.

Your first question is whether or not the change of the name of the corporation from Fairfax Community Hospital, Inc. to County Memorial Hospital is sufficient to qualify the hospital for state financial aid as provided in Section 184.290, RSMo 1949. That section is as follows:

"Any county in this state, except as provided in section 184.300, shall be eligible to receive state financial aid to be paid from moneys appropriated therefor upon certification to the governor by the county court that such county has available an adequate sum of money to be used for the purchase or erection and the operation of a county memorial hospital, or a memorial addition to an existing county hospital, commemorating the services of our armed forces during World War II and

Honorable Walter L. Mulvania

upon certification to the governor by the director of the division of health of the state department of public health and welfare that the purchase or erection and operation of the proposed county memorial hospital, or a memorial addition to an existing county hospital, is, in his judgment, in the interest of public health and welfare and that sufficient funds are available to finance not only the purchase or erection of the memorial hospital, or a memorial addition to an existing county hospital, but also the operation of such hospital. State financial aid allocated to a county eligible for aid under the provisions of sections 184.290 and 184.300 shall be equivalent to the amount of money actually expended by the county in the purchase or erection of a memorial hospital, or a memorial addition to an existing county hospital, but in no case shall such state financial aid to any county exceed ten thousand dollars."

It would seem that this first question is sufficiently answered by the wording of the section which has been set out above. You will note that under that section only counties are eligible to receive state aid in connection with the purchase or erection of a memorial hospital. Therefore, in order for a hospital to qualify it would, of necessity, have to be one purchased or erected by a county. There is no provision for state aid to any other hospital regardless of ownership. The mere changing of the name would not make the hospital a county hospital.

You ask further, in the event of a change in the name of the hospital, whether or not the county assumes an obligation to the hospital. Unless there is a transfer of title, the county would be under no obligation toward this hospital. As stated above, under its present ownership, the hospital may not receive state aid. Unless it becomes in truth and fact a county hospital, there is no duty on the part of the county in connection with its operation.

Honorable Walter L. Mulvania

Your third question is whether or not a county qualifying for state aid to a hospital under Section 184.290, RSMo 1949, must expend at least some amount in connection with the purchase or erection of said hospital. You will note that Section 184.290 provides for state participation when a "county has available an adequate sum of money to be used for the purchase or erection and the operation of a county memorial hospital, or a memorial addition to an existing county hospital, * * * . State financial aid allocated to a county eligible for aid* * * shall be equivalent to the amount of money actually expended by the county in the purchase or erection of a memorial hospital, or a memorial addition to an existing county hospital, * * * ."

The plain wording of Section 184.290 is that the county must, in fact, expend an amount not to exceed Ten Thousand (\$10,000.00) Dollars in the purchase or erection of a memorial hospital, or an addition to an existing county hospital, to qualify for the aid. Therefore, under the facts that you set forth in this opinion request, it would be necessary for the county court to purchase the Fairfax Community Hospital from the corporation and to operate the said hospital as a county hospital in order to qualify for state aid.

The Legislature has provided for the operation of county hospitals through a board of trustees and has set out rather extensively the powers, duties and procedures to be followed by the county courts and the boards of trustees in the operation and maintenance of county hospitals, (Sections 205.160 - 205.370, RSMo 1949).

Therefore, in answer to this third question we state categorically that the county must expend an amount in connection with the purchase or erection of a county hospital equal to that for which it may qualify for state aid. It would also necessarily follow that in the event the county purchased the hospital from the Fairfax Community Hospital, Inc., it would then be the duty of the county court to maintain and operate the said hospital in accordance with the provisions of Sections 205.160 - 205.370, RSMo 1949. The corporation would necessarily be divested of control of the hospital if the county court should purchase the same.

CONCLUSION

Therefore, it is the opinion of this department that: 1) The mere naming of a hospital "County Memorial

Honorable Walter L. Mulvania

Hospital" is not sufficient to qualify such hospital for state financial aid provided by law unless thereafter the said hospital is, in fact, being operated by a county as a county hospital; 2) The county assumes no financial obligation for a hospital owned by a corporation which changes the name to "County Memorial Hospital", and 3) A county, in order to qualify for state financial aid for the purchase or erection and the operation of a County Memorial Hospital, or a memorial addition to a county hospital, must actually expend an amount equivalent to the amount of money sought in aid from the state, not to exceed Ten Thousand (\$10,000.00) Dollars.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

JRB:lr

SCHOOLS: Action in mandamus is proper procedure to enforce payment of a judgment obtained against a school district.

May 4, 1951

Honorable Charles E. Murrell, Jr.
Prosecuting Attorney
Knox County
Edina, Missouri

5-10-51
FILED
65

Dear Sir:

Your letter at hand requesting an opinion of this department, which reads as follows:

"I would like to have a copy of your opinion quoted on page 69 of Missouri School Laws Publication, Number 10, for the year 1947, pertaining to tuition for nonresident students. The opinion was dated September 14, 1934.

"Please advise me, after review by you, if your conclusions are the same now and also we would like an answer to the following question:

"If the school district accepting the students should bring suit and obtain judgment for tuition, what is the procedure for collection of the same?"

At the outset, you request a copy of an opinion written by this office under date of September 14, 1934, and a copy of same is enclosed.

In connection with your question regarding the matter of collecting a judgment for tuition obtained against a school district, it is the duty of such school district, through its directors, to pay said judgment from the proper fund.

Honorable Charles E. Murrell, Jr.

In State ex rel. Black v. Renner, et al., 148 S.W. (2d) 809, an action in mandamus was instituted by a school teacher against the directors of five common school districts to enforce the payment of a judgment for wages previously obtained. In considering the question the court, at l.c. 811, said:

"The judgment in favor of relator was a joint and several judgment, and each school district was liable for the entire amount thereof. When that judgment became final it was the duty of each district, acting through its directors, 'to take such steps as the Constitution authorizes for the immediate payment' of the judgment. * * *"

In State ex rel. Hufft v. Knight, et al., 121 S.W. (2d) 762, there was also involved a proceeding in mandamus instituted by a school teacher against the directors of a particular school district to enforce a judgment previously obtained for services rendered by the teacher. At l.c. 764 the court, in ruling on the question, said:

"It will be noted from the stipulation filed by the parties that all the matters and things alleged in the petition for mandamus are true. The petition alleges that the directors can, under the law, certify the levy of an assessment of 65 cents on the \$100 valuation of the District, under the following statutes and constitutional provisions: Sections 9214, 9226, 9284 and 9261, R.S. Mo. 1929, Mo. St. Ann., Secs. 9214, 9226, 9261, 9284, pp. 7086, 7092, 7109, 7143, and Article 10, Sec. 11, Constitution of Missouri, Mo. St. Ann. Const. art. 10, Sec. 11. Therefore we presume that the requirements of these statutes have been met. If the directors can recommend to the county clerk a levy of 65 cents on the \$100 valuation and instead of doing so, merely recommend a levy of 20 cents on the \$100 valuation, which it is conceded is not a sufficient levy to pay the judgment, which the appellant holds against the School District, then mandamus will lie to compel

Honorable Charles E. Murrell, Jr.

the directors to certify such tax as can be legally levied and apply the surplus, after paying current expenses, to the payment of the judgment held by appellant.

"Mandamus is a proper remedy to enforce a judgment against a municipal or public corporation and it has been generally used for such purpose in this state. It is an ancillary proceeding to the main suit and when so employed is not a new suit, but simply process essential to jurisdiction. It is a means of enforcing the collection of a judgment against a municipal corporation and is the legal equivalent of an execution upon a judgment against an individual. State ex rel. Hentschel v. Cook, Mo. App., 201 S.W. 361; State ex rel. Edwards v. Wilcox, Mo. App., 21 S.W. 2d 930. Since an execution may not be run against the property of a school district or other political sub-division of the State (State, to Use of Board of Education, v. Tiedemann, 69 Mo. 306, 33 Am. Rep. 498; City of Edina v. School District, 305 Mo. 452, 267 S.W. 112, 36 A.L.R. 1532; Sec. 1161, R.S. Mo. 1929, Mo. St. Ann. Sec. 1161, p. 1424) the only other procedure available to a judgment creditor to enable him to collect his judgment is for a court of competent jurisdiction to issue its writ of mandamus, requiring the extension of a sufficient levy within the constitutional limits, to provide funds for the payment of the judgment. State ex rel. Hentschel v. Cook, supra; State ex rel. Edwards v. Wilcox, supra.

"Mandamus, of course, cannot be employed to control the discretion of one authorized to determine the levy necessary to provide funds necessary for a district. Yet, a school district owes the duty to pay an obligation established by a judgment against it, and its officers are required to take such steps as the Constitution authorizes for the immediate discharge of the liability fixed by the judgment. Its duty to do so

Honorable Charles E. Murrell, Jr.

results from the plain moral as well as the legal obligation of a municipality or district to pay its debts and no discretion within the legal limitation of the performance of the duty can rightfully be claimed or exercised. However, a court cannot by mandamus proceedings compel a municipal sub-division of the state to levy a tax in excess of the maximum fixed by the Constitution. Bushnell et al. v. Drainage District, Mo. App., 111 S.W. 2d 946. The duty of a school district to discharge its obligations, if it can do so by a levy within the limits provided by law, is mandatory upon the district and its directors, and it is mandatory that they certify a levy within the legal limits, sufficient to retire the obligations of the district and mandamus does not interfere with any discretionary powers entrusted to the directors. * * *

In view of the foregoing decisions it appears that, when a judgment is obtained against a school district and the board of directors thereof refuse to pay said judgment, the proper procedure to enforce payment of the judgment is the institution of a proceeding in mandamus against the directors of the school district. By a proceeding in mandamus, the school district against which judgment was obtained would be required to pay it from the proper fund or would be required to take the necessary steps to procure the extension of a sufficient tax levy within the constitutional limits to provide funds for the payment of the judgment. The latter would not be necessary if there was sufficient money in the proper fund to pay the judgment.

CONCLUSION

It is therefore the opinion of this department that, where a school district obtains judgment against another school district for tuition, the proper procedure for enforcing said judgment, in the event the school district against which it was obtained refused to pay it, would be the institution of a proceeding in mandamus.

Respectfully submitted,

APPROVED:


J. E. TAYLOR
Attorney General

RICHARD F. THOMPSON
Assistant Attorney General

RFT:ml
Enc

COUNTY ROAD:
REPAIR A "USE" OF
ROAD:



November 19, 1951

Repair of county roads is "use" under Sec. 392.080, RSMo 1949, authorizing construction and maintenance of telephone and telegraph lines along public roads in such manner as not to incommode the public in the use of such roads. Telephone wires preventing grading of shoulders may be obstructions as much as if placed in traveled portion of roads and may incommode public in use of roads. May be public nuisances, and enjoined as such.

11-20-51

Honorable Charles E. Murrell, Jr.,
Prosecuting Attorney
Edina, Missouri

Dear Sir:

Receipt of your request for a legal opinion of this department is hereby acknowledged, said request reads as follows:

"In reference to Section 392.080, R.S. Mo. 1949, I would like to have the opinion of your office as to whether or not the portion of said statute which states 'in such manner as not to incommode the public in the use of such roads' includes construction, repair and maintenance of roads as a public use of such roads."

Not being certain of the exact nature of your inquiry, we asked you to give further details concerning same. You have complied with our request, and we quote the pertinent part of your last letter as follows:

"In connection with the request for an opinion relative to Section 392.080 R. S. Mo. 1949, we have, on several roads in this county, telephone lines constructed in such a manner as to interfere, because of their low height, with the grading of the roads and maintenance of the same. It would appear, from the above mentioned section of the statutes, that we might be

Honorable Charles E. Murrell, Jr.,

able to require the telephone companies to construct their lines of sufficient height above the right-of-way to permit the county to improve and repair the roads, including the grading of the shoulders, on the grounds that such repair and maintenance is a public use of such roads."

Section 392.080, RSMo 1949, to which reference is made reads as follows:

"Companies organized under the provisions of sections 392.010 to 392.170, for the purpose of constructing and maintaining telephone or magnetic telegraph lines are authorized to set their poles, piers, abutments, wires and other fixtures along, across or under any of the public roads, streets, and waters of this state, in such manner as not to incommode the public in the use of such roads, streets and waters; provided, any telegraph or telephone company desiring to place their wires, poles and other fixtures in any city, they shall first obtain consent from said city through the municipal authorities thereof."

It appears that telephone lines have been constructed along the right of ways of several county roads in your county of an insufficient height above the ground to permit the county to grade and maintain the roads. You further state that the county should be able to require the telephone companies to construct their lines a sufficient height above the right of ways to permit the improvement and repair of the roads on the ground that the repair and maintenance is a public use of such roads.

The opinion request based on such facts asks for an interpretation of Section 392.080, RSMo 1949, supra, particularly that portion which provides, "* * *in such manner as not to incommode the public in the use of such roads* * *."

The request makes the further inquiry as to whether or not the construction, repair and maintenance of such roads are to be considered as a "use" thereof, within the meaning of this section.

The primary purpose for which all roads, streets, and highways are constructed and maintained is for the travel and transportation thereover by the public, and for any other use which

Honorable Charles E. Murrell, Jr.

may be incidental to such primary purpose.

The right of the public to use a public road for travel or transportation is a fundamental right which cannot be encroached upon by individuals or corporations. Such roads are for the general use of the public without discrimination, each traveler having the same right to travel, or transport his property thereover as that possessed by every other person. However, we do not mean by this statement that the right is absolute or unqualified, for such is not the case. In the exercise of the police power, the state may make such reasonable rules and regulations effecting the traffic over its roads as may be necessary for the preservation of the safety of the lives and property, as well as for the convenience of all persons traveling over the roads. The state may, by legislative grant allow the use of its roads for other public purposes than travel or transportation, so long as such uses do not unnecessarily or unreasonably impede public travel or transportation. Anything which may constitute an obstruction, or an excessive use of a public road, or which may inconvenience or impede public travel is a public nuisance, and under certain circumstances may be enjoined as such.

In this connection we call attention to the case of State v. Campbell, 80 Mo. App. 110, 1. c. 113, the court said:

"* * *Any encroachment upon any part of the highway, whether upon the traveled part thereof or on the sides comes clearly within the idea of nuisance. Every person has a right to go over or upon any part of the highway, and the fact that from the notions of economy, or otherwise, the public authorities having the same in charge have not seen fit to work the whole of it, does not alter or change the right. A traveler has the right to go anywhere on the right of way outside of the beaten track of the highway if he so chooses, and any obstacle placed in the way of his doing so is an infringement and obstruction of a public right, and an annoyance and therefore a public nuisance.

"The obstacle must however, be of such a character and kind as to operate as an obstruction to public travel, or to public rights, or to endanger the safety of persons traveling there, or as to offend and annoy those who come in contact with it.

* * *

Honorable Charles E. Murrell, Jr.

Referring to the opinion request again, it appears an implication is made that the improvement, maintenance or repair of the public roads of your county might be classified, as a "use" within the meaning of that portion of Section 392.080, last quoted.

It is common knowledge that the shoulders and ditch lines are a part of every public road, and that their repair and improvement are indispensable to keeping a road in proper condition for the use for which it was constructed. It follows as a matter of course that when obstructions are placed on the right of way of a public road which prevents the improvement and repair of the shoulders or ditch lines of the road, so that it cannot adequately serve the public, the public will be inconvenienced in the use of such road, and the obstruction will be as much an obstruction and an inconvenience to the public as if it had been placed in the traveled portion of the road.

From the facts in the case of County Court v. White, 91 S. E. 350, it appears that a county road was being reconstructed. Telephone lines located on the right of way interfered with the machinery being used to widen the road, and it was necessary to remove the poles and wire before the construction work could be resumed.

In the State of West Virginia, where the road was being reconstructed, a statute in effect provided that where the telephone or other poles and wires constituted an obstruction in a public highway, the owner of such line was required to remove the same at his own expense. The controversy which developed in the case was whether the telephone company should remove its line or whether the contractor reconstructing the road should do so.

We have no statute in Missouri requiring the owner of telephone or other lines to remove them at his own expense when the lines on the right of way of public roads interfere with the construction or improvement of the roads and we are not here concerned with the controversy mentioned. We cite the case for other important reasons, since we believe that if an obstruction on the right of way is of such nature as to prevent the improvement or repair of the road, including the grading of the shoulders, it is as much an obstruction of the road as if it had been placed in the traveled portion of said road, and that the public will be inconvenienced in its use of the road by reason of said obstruction.

We quote from that part of the opinion of said case found at l. c. 351, as follows:

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"* * *The right of the public in the highway for the purpose of travel in the ordinary modes is a primary and fundamental right, and is not limited to that portion only of the right of way heretofore traveled. Respondents have a permissive and subordinate right only, which exists only so long as it does not interfere with the primary and superior rights of the traveling public. Such primary right to occupy any and all parts of the right of way for the purpose of a roadway necessarily implies the right to widen and improve the traveled portion of the road, whenever it becomes necessary for the better accommodation of the public. This principle was not controverted in the argument. But it was contended that the poles did not interfere with travel in the roadway, and that, being in the way only of the work of improving the highway, it was therefore the duty either of the county court or of their contractors to remove them in a careful manner, at their own expense. This is certainly not the law. Section 56a(77), c 43, Barnes' Code (Code 1913, Sec. 1844) reads as follows:

"It shall be the duty of all telephone, telegraph, electric railway or other electrical companies, to remove and reset, telephone, telegraph, trolley and other poles and the wires connected therewith, when the same constitute obstructions to the use of the public road by the traveling public."

"This statute imposes the duty upon a telephone company to remove its poles and wires when they constitute obstructions to the use of the public road either for travel or for the purpose of repair. The widening and permanently improving the road now being done is for the benefit of the traveling public, and the interference by the poles and wires with this work, while not within the letter of the statute, is clearly within its spirit and intendment, and the duty to remove the poles is as imperative upon respondents as if they stood in the old roadbed and did actually hinder travel thereon. It is clearly such an interference as is

contemplated by the statute. Interference with the work of improving a highway for better traveling is necessarily an incidental interference with public travel. It is not shown that the contractors were under any contractual obligation to remove the poles, and the law certainly imposes no such duty as an incident to their undertaking."

(Underscoring ours.)

In view of the foregoing, it is our thought that telephone lines located on the right of ways of the roads of your county, and maintained in such a manner as to prevent the grading of the shoulders may constitute obstructions (and public nuisances) of said roads as much so as if placed in the traveled portion of same. While it may be proper for the county court to request the owner to raise their telephone lines a sufficient height to permit the grading of the shoulders of the county roads, it appears that the more effective remedy, particularly in the event the lines should not be raised, would be an action to enjoin the public nuisance under such circumstances.

The county roads cannot adequately serve the public in carrying the traffic for which they were constructed unless they are continually improved and repaired, and anything which prevents such improvement or repair work will surely incommode the public in the use of said roads. It is our further thought that such improvement and repair, including the grading of the shoulders might properly be classified as a "use" of such roads, within the meaning of Section 392.080, supra.

CONCLUSION

It is the opinion of this department that telephone and magnetic telegraph companies may construct and maintain their lines along, across, or under any of the public roads of the state under the provisions of Section 392.080, RSMo 1949, in such a manner as not to incommode the public in the use of such roads, but where a telephone company constructs and maintains its lines an insufficient height above the right of way of certain county roads to permit the improvement, and grading of the shoulders, thereby allowing said roads to become in disrepair and travel hindered, or made impossible, the public will become incommoded in the use of such roads, and the repair, and grading of the shoulders will constitute a "use", within the meaning of Section 392.080,


Honorable Charles E. Murrell, Jr.

supra. Under such circumstances the telephone lines may become as much an obstruction as if placed in the traveled portion of such roads, and may be enjoined as public nuisances.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

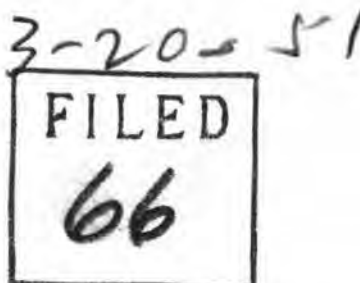


J. E. TAYLOR
Attorney General

PNC:hr

LIABILITY: Sureties on bail bond conditioned for the appearance of
BAIL BONDS: defendant in court in a criminal proceeding at a given
time are discharged from the obligations of the bond
because of the fact that principal is confined in the
State Penitentiary of Missouri, having been prosecuted
and convicted of a second and different offense before
date for appearance in accordance with provisions of
the bond. March 13, 1951

Honorable Ralph B. Nevins
Prosecuting Attorney
Hickory County
Hermitage, Missouri



Dear Mr. Nevins:

We have your recent letter requesting an opinion of this
department. Your letter is as follows:

"One Loren M. Young was charged by complaint
in Magistrate Court of Hickory County with
crime of armed robbery and upon preliminary
examination was bound over to Circuit Court
and on November 20th, 1950, filed applica-
tion for change of venue and change was
granted to Greene County and was to have
appeared on January 8th, 1951 in the Cir-
cuit Court of Greene County, but on that
date was in jail at Harrisonville, Missouri,
on a charge of assault with intent to kill,
and burglary and larceny charges. Judge
Collinson of the Circuit Court of Greene
County set the case for trial on January
29th, 1951, and the defendant Loren M.
Young did not appear as he had entered a
plea of guilty to the charges in Cass
County on the 13th day of January, 1951,
and was incarcerated in the State Peniten-
tiary at the date he was to appear for
trial in Greene County.

"The crime for which he is now serving
sentence in the State penitentiary was
committed subsequent to the giving of bond
in Hickory County on November 20th, 1950,
for his appearance in Greene County
circuit court on January 8, 1951.

"Is the state entitled to a forfeiture of
the recognizance or are the sureties
entitled to release due to the fact that
the defendant is in the State Penitentiary
of Missouri?"

Honorable Ralph B. Nevins

Section 544.640, RSMo 1949, pertaining to the forfeiture of recognizances, reads as follows:

"If, without sufficient cause or excuse, the defendant fails to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, according to the condition of his recognizance, the court must direct the fact to be entered upon its minutes, and thereupon the recognizance is forfeited, and the same shall be proceeded upon by scire facias to final judgment and execution thereon, although the defendant may be afterward arrested on the original charge, unless remitted by the court for cause shown."

(First underscoring ours.)

The question immediately occurs, in connection with the section just quoted, as to what constitutes such sufficient cause or excuse for the failure of the defendant to appear at the trial at the time designated as to relieve the sureties on the bail bond from liability. There are several cases which set up three types of excuses that are acceptable. There are such cases in different states and both in the state and Federal courts. One of the most recent cases is the Missouri case of State v. Wynne, 204 S.W. (2d) 927, 356 Mo. 1095. We quote as follows from the opinion of the court in that case at S.W. 1.c. 929:

"The courts generally hold that the sureties are discharged as a matter of law when the return of the defendant is prevented by (1) an act of God; (2) an act of the law; (3) an act of the obligee, the state where the criminal charge is pending. (Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287; Id., 36 Conn. 242, 4 Am. Rep. 58; 8 C.J.S., Bail, § 76, p. 147.) * * * *"

We shall consider the questions, first, as to whether or not, when subsequent to arraignment on one charge and the execution of a bond conditioned for the appearance of the defendant in court at a given time the defendant is arrested and prosecuted in another county in this state and convicted and confined in the penitentiary, all prior to the date fixed

Honorable Ralph B. Nevins

in the bond for his appearance in court for trial for the first offense, his failure to appear at said trial is due to an act of the law; and second, whether or not, under such circumstances his failure to appear is also due to an act of the obligee, the state where the criminal charge is pending.

We find Missouri authority for the proposition that in cases in which the arrest, conviction and imprisonment for the second offense occurs in a state other than Missouri, the defendant's imprisonment and consequent inability to attend the Missouri trial does not relieve the sureties of liability. This is the case of *State v. Horn*, 70 Mo. 466, the following is a quotation from the opinion of the court at l.c. 467:

" * * * The defense was that Horn was prevented from performing the conditions of the recognizance by reason of his arrest in Illinois and his trial and conviction and sentence to the penitentiary of that State. This defense was held invalid. This was so held, in accordance with the opinion of the circuit court of the United States in United States v. Van Fossen, 1 Dill. C. C. 406, and of the Supreme Courts of Tennessee in Devine v. The State, 5 Sneed, 623, and of Connecticut in Taintor v. Taylor, 36 Conn. 242. As we concur in these opinions it is unnecessary to examine the questions decided and therefore affirm the judgment. * * * "

After research, however, we have been unable to find any case in which any Missouri appellate court has discussed circumstances under which the conviction and imprisonment for the second offense was in and resulting from an action arising in another county of the State of Missouri. We are of the opinion that there is a definite distinction between the two sets of circumstances for the reason that in a case in which the defendant is tried and convicted of a second offense by a court in another county of Missouri before the day for his appearance at the trial for the first offense that trial and conviction and imprisonment in the penitentiary is an act of the State of Missouri, executed pursuant to the law of the state, and is, therefore, an act of the law, and also that trial and conviction and imprisonment is an act of the State of Missouri, the obligee in the bond which was given for the appearance of the defendant at the proposed trial for the first offense. And while it is true as above stated that we find no Missouri case passing upon this set of circumstances, we do find cases from other jurisdictions.

Honorable Ralph B. Nevins

In the case entitled *In Re James*, decided by the United States Circuit Court of the Western District of Missouri, reported in 18 Fed. 853, the circumstances, although slightly different from the set of circumstances before us for consideration, nevertheless involved the same legal principle which is under consideration in this opinion, whereas we have before us a situation in which the second arrest was made and the prosecution, conviction and confinement in the penitentiary obtained by the officials representing the State of Missouri in another Missouri county, which said arrest, conviction and confinement rendered it impossible for the sureties on the bail bond, given to assure the attendance of the defendant at a trial pursuant to the first arrest also in this state, to produce the defendant in court according to the provisions of the bond. The *James* case above cited was a case in which, subsequent to the giving of a bail bond for appearance in a Missouri court conditioned for the appearance of the defendant Frank James at the state court trial, the Federal authorities arrested James and sought to take him to Alabama to be tried in a Federal court located in Alabama, and the sureties on the bond conditioned for the appearance of James in the Missouri state court instituted a proceeding in the United States Circuit Court for the Western District of Missouri to prevent the United States Marshal from taking James out of the state and seeking the transfer of custody of the prisoner from the Federal authorities to the sureties in the state court bond in order that they might produce the prisoner at the trial in the Missouri court. The United States Circuit Court in its opinion held that the proposed act of the Federal authorities in taking the defendant James out of Missouri, which act would render it impossible for the sureties on the bail bond to deliver him for trial in the Missouri state court, was "an act of the law" within the meaning of the authorities, which act of the law would prevent the sureties from procuring the attendance of James at the trial in the state court, and that said "act of the law," therefore, would result in the release of the sureties from the obligations of the bond. The Federal circuit court, however, turned the defendant over to the state court on another ground. The court, after quoting the Missouri statute, *supra*, discussed the question of the release of the sureties as follows, l.c. 858:

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"It is claimed that the terms employed, 'without sufficient cause or excuse,' were intended to meet cases like the present. The intention of the section in the main would seem to be to lay down definite rules for declaring forfeitures or recognizances and for proceedings to enforce them. Without undertaking to give a definite construction to the section of the statute under consideration, I strongly incline to the opinion that it applies to the present case. But whether it does or not, my views, aside from the statute, are that in a case where the bondsmen are not charged or being chargeable with neglect, and a court of competent jurisdiction wrested the prisoner from them, that this is, in the language of the authorities, 'an act of the law,' and can be set up in defense to a suit on the bond. The sureties being able to do this, they cannot be injured by the removal. So far, then, as the sureties of James are concerned, treating their obligation from a mere legal standpoint, they incur no responsibility, and their obligations and rights do not stand in the way of a removal. But it is otherwise with the state. Its release has already been discussed, and the implied rights of the state shown. These rights sufficiently appear and are brought to the attention of the judge by the joint jailers, the sureties, and cannot be ignored."

Honorable Ralph B. Nevins

In the case of *People v. Meyers*, 8 P. (2d) 837, a California case, the defendant, who was obligated to appear at a trial in Oakland, was arrested in San Francisco and tried and convicted for another offense prior to the date for appearance in Oakland in answer to the first charge. The following is a quotation from the opinion of the Supreme Court of California at l.c. 838 of 8 P. (2d):

"The obligation assumed by defendants to produce the accused was absolute, and there is no room for interpretation of the contract. The sole defense was impossibility of performance, and the contention is that performance was prevented by operation of law and by act of the other party to the contract. Since the other party is, in this case, the state, the two excuses become one. There is, of course, no doubt as to the sufficiency of an excuse for performance by sureties upon such grounds. *County of Los Angeles v. Maga*, 97 Cal. App. 688, 276 P. 352; 3 Williston, Contracts, § 1944.

"Certain principles relating to such a situation have been the subject of judicial consideration in this state and elsewhere. One is that the mere arrest and incarceration of a person released on bail does not exonerate the bail, if the accused is at liberty subsequently and at the time he is required to appear on the first charge. In such case performance by the sureties is possible. *County of Los Angeles v. Maga*, supra. If, however, he is still in custody at the time of the hearing on the first charge, the liability of the sureties is, under some of the authorities, suspended, and, under others, wholly exonerated. But all are substantially in accord on the point that during the custody the surety cannot perform and the bail cannot be forfeited. See *McDonald v. Commonwealth*, 213 Ky. 570, 281 S.W. 538, 45 A.L.R. 1034; *State v. Funk*, 20 N.D. 145, 127 N.W. 722, 30 L.R.A. (N.S.) 211, Ann. Cas. 1912C, 743; *Belding v. State*, 25 Ark. 315, 99 Am. Dec. 214, 4 Am. Rep. 26; 3 Williston, Contracts, § 1944. Although our Penal Code, § 1567, permits the bringing of an imprisoned person before a court upon its order, there is nothing in the section

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nor in the cases construing it to indicate whether a bondsman could avail himself of its provisions. But it is unnecessary to consider the meaning of this statute, in view of the facts of the instant case. We are satisfied that on principle, and under the better authorities, the incarceration of Mrs. Breed operated to suspend the liability of defendants. Such, apparently, was the view of the court, since no attempt was made to forfeit the bail during the time of her imprisonment.

* * * * *

"In order to give judgment for plaintiff, this court would have to hold that the act of a creditor which deliberately attempts to make performance impossible does not impair the right of that creditor to demand full performance of the other party, where, by the exercise of extraordinary efforts and the disregard of obvious hazards, the latter may later find it possible to perform. We are not prepared to lay down such a rule. The delay and unusual hazards caused by the deliberate act of the creditor is a sufficient excuse. The state, acting through its officers in one county, cannot hold defendants liable for failure to perform, when such performance was delayed, hindered, and finally made, for all practical purposes, impossible, by the state acting through its officers in another county."

(Underscoring ours.)

We direct attention to the fact that this opinion holds that the sureties are relieved both because the act of the state in prosecuting, convicting and imprisoning the defendant for the second offense was an act of the law, and because the act of the state in so doing was an act of the obligee in the bond.

We also quote from the case of *Scrivner v. State*, 48 P. (2d) 332, 1.c. 333:

" * * * Where one is charged with crime and gives and executes bond for his appearance with surety, or has been convicted of crime

Honorable Ralph B. Nevins

and executes an appeal bond with surety, conditioned upon his appearance in court and submitting to the judgment of the court, if affirmed, and afterwards is arrested and kept in custody on another crime in the same jurisdiction and by the same authorities, and thereby prevented from appearing according to the condition of his bond and submitting to the judgment of the court, and his sureties are thereby rendered unable to produce the principal in court to submit to said judgment, they are thereby exonerated as such sureties. (State of) North Dak. v. Funk, 20 N.D. 145, 127 N.W. 722, 30 L.R.A. (N.S.) 211 (Ann. Cas. 1912C, 743); Woods v. State, 51 Tex. Cr. 595, 103 S.W. 895; People v. Robb, 98 Mich. 397, 57 N.W. 257."


We are of the opinion that these holdings by the two courts above mentioned, in the absence of any Missouri authority to the contrary, justify us in the opinion that where, after a defendant has given bond to appear at a trial for one offense in the State of Missouri and is subsequently prosecuted, convicted and imprisoned by the State of Missouri in an action arising in another county before the date for his appearance at the first trial, the circumstances warrant the release of the sureties on the bond for appearance at the trial for the first offense from all further liability.

CONCLUSION

We are accordingly of the opinion that the sureties on the bond executed by Loren M. Young on November 20, 1950, in Hickory County, Missouri, are not liable under said bond for the reason that at the date of the proposed trial, when the defendant was to appear, he was imprisoned in the state penitentiary as a result of his prosecution in Greene County, Missouri, which prosecution was subsequent to the execution of the bond in Hickory County, and due to said imprisonment could not appear at the designated time for trial in the Circuit Court of Hickory County.

Respectfully submitted,

APPROVED:


J. E. TAYLOR
Attorney General

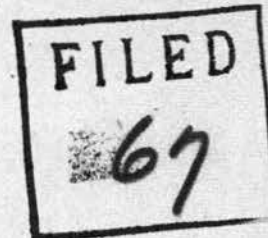
SAMUEL M. WATSON
Assistant Attorney General

SMW:VLM

LABOR:

Federal Fair Labor Standards Act of 1938
does not apply to workers employed by a
county.

February 1, 1951



Mr. Jeremiah Nixon
Assistant Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Mr. Nixon:

We are in receipt of your recent request for an official
opinion, which request is as follows:

"Jefferson County hires a group of roughly
twenty-seven men to work on the county roads.
They work only on the county roads. Their
duties consist of grading, maintaining, clear-
ing and generally keeping the county roads in
good condition. It has been the policy of
this county to have these men work forty-eight
hours a week in the wintertime and forty-nine
hours a week in the summertime. The county
gives each man so employed one week paid
vacation per year.

"Would you please give me an opinion as to
whether the county is obligated to pay time
and a half to these men so employed, for
overtime?

"It would seem to me that there would be a
serious question as to whether these men
would come under the Federal Statutes re-
lating to this, since the county roads that
they work on may be considered as linking up
the various U. S. Highways that go across
Jefferson County."

Mr. Jeremiah Nixon

It appears that Jefferson County hires a group of men to work on the county roads, working them about forty-eight or forty-nine hours a week. And your question is: "Would you please give me an opinion as to whether the county is obligated to pay time and a half to these men so employed, for overtime?"

There is no law of Missouri to cover the question of overtime pay for this type of employment. The problem then resolves itself to an examination of the Federal Fair Labor Standards Act of 1938, which embraces such matters as wages, hours, and extra pay for overtime. Section 3(d) of this Act in defining "employer" states that the term "shall not include the United States or any State or political subdivision of a State." Section 203(d), Title 29, United States Code, 1946 Edition.

The U. S. Circuit Court of Appeals, Fifth Circuit, handed down a ruling on this clause in 1943 in the case of *Creekmore v. Public Belt Railroad Commission*, 134 Fed. 2d 576. In the course of that opinion the court said:

"The exclusion provision of Section 3(d) of the Fair Labor Standards Act is couched in plain and unambiguous language and should be given effect as it is written. Appellant strongly contends, however, that because of the remedial nature of the Act it was the legislative intent to include within its coverage employees such as those working for the Public Belt Railroad Commission for the City of New Orleans; that in operating the railroad the City of New Orleans acts in a purely proprietary capacity; and that employees of the railroad should be within the coverage of the Act.

"In construing the Act the duty of the Court is to determine what employers and employees are within its coverage, not what employees 'should' have been covered, for the question of who 'should' be covered is a matter solely within the province of the legislative branch of the government. The language of Section 3(d) being plain, its meaning clear, the result reasonable, we see no reason for resorting to extraneous considerations in an effort to construe and give to such language another and different meaning. Cf. *Helvering v. New*

Mr. Jeremiah Nixon

York Trust Co., 292 U. S. 455, 54 S. Ct. 806, 78 L. Ed. 1361; United States v. Mo. Pac. R. Co., 278 U.S. 269, 49 S. Ct. 133, 73 L. Ed. 322.

"The City of New Orleans being a political subdivision of the State of Louisiana, and the Public Belt Railroad Commission being one of its duly authorized, functioning departments, we think it clear that the employer-employee relationship between these employees and the City and its Commission falls squarely within the language of Section 3(d) which in defining 'employer' excludes 'any State or political subdivision of a State'.

"In October 1938, the Administrator of the Wage and Hour Division of the Department of Labor was asked to express an opinion as to the 'applicability of the Fair Labor Standards Act to the Public Belt Railroad System operated through the Public Belt Railroad Commission for the City of New Orleans'. By letter of July 10, 1939, the Assistant General Counsel of the Department, by direction of the Administrator, answered the letter and stated: 'If the Public Belt Railroad System is wholly owned and controlled by the City of New Orleans a political subdivision of the State of Louisiana, through the Public Belt Railroad Commission for the City of New Orleans, it is our opinion that the employees of the Public Belt Railroad System are not subject to the Act by reason of the provision quoted above contained in Section 3(d).'"

The term "political subdivision" is defined by law in Missouri, Section 70.210, RSMo 1949, as follows:

"The term 'governing body' as that term is used in sections 70.210 to 70.320 shall mean the board, body or persons in which the powers of a municipality or political subdivision are vested. The term 'political subdivisions' as used in sections 70.210 to 70.320 shall be construed to include counties, townships, cities, towns, villages, school, road, drainage, sewer, levee and fire districts."

Mr. Jeremiah Nixon

It is evident that the Congress in passing the Fair Labor Standards Act intended to exclude from its operations all such public bodies and municipalities as cities and counties. A county is, as defined above, a subdivision of the State. It is not an "employer" under the Act; and its workers, therefore, are not entitled to any benefits derived from the law.

CONCLUSION

It is the opinion of this department that Jefferson County is not obligated to pay time and one half for overtime to its workers on the county roads.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

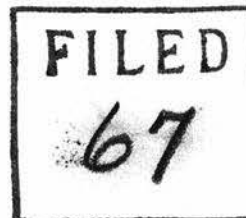
BAT:hr

SCHOOLS: Teacher cannot serve as secretary of consolidated school district.

April 26, 1951

4-26-51

Honorable Jeremiah Nixon
Assistant Prosecuting Attorney
Jefferson County
Hillsboro, Missouri



Dear Sir:

This department is in receipt of your recent letter requesting an official opinion, which letter reads in part as follows:

"The County Superintendent of Schools in Jefferson County has requested an opinion as to whether the six man school board of Consolidated School District #1 of Jefferson County, Missouri, would be authorized to appoint a teacher in that district to the post of secretary of the school district. As stated before, this teacher teaches in the consolidated school in this district."

Sections 165.163 to 165.260, RSMo 1949, relate to common school districts. Among these sections we find Section 165.213, RSMo 1949, which section provides for the appointment of a clerk of a county school district. This section reads in part as follows:

"The directors shall meet within four days after the annual meeting, at some place within the district, and organize by electing one of their number president; and the board shall, on or before the fifteenth day of July, select a clerk, who shall enter upon his duties on the fifteenth day of July, but no compensation shall be allowed such clerk until all reports required by law and by the board have been duly made and filed. * * *"

Honorable Jeremiah Nixon

Within the afore-mentioned sections there are further provisions relating to the duties and liabilities of the clerk of such school districts.

Section 165.320, RSMo 1949, is applicable to consolidated school districts such as the one under discussion. This section reads in part as follows:

"Within four days after the annual meeting, the board shall meet, the newly elected members, who shall be qualified by the taking of the oath of office prescribed by article VII, section 11, of the constitution of Missouri, and the board organized by the election of a president and vice-president, and the board shall, on or before the fifteenth day of July of each year, elect a secretary and a treasurer, who shall enter upon their respective duties on the fifteenth day of July; said secretary and treasurer may be or may not be members of the board. No compensation shall be granted to either the secretary or the treasurer until his report and settlement shall have been made and filed or published as the law directs.
* * *The president and secretary, except as herein specified, shall perform the same duties and be subject to the same liabilities as the presidents and clerks of the school boards of other districts."
(Emphasis ours.)

We therefore see that while within common school districts there is a clerk appointed to perform various duties, the legislature has provided that within consolidated school districts a secretary rather than a clerk be appointed to perform these same duties. It is our conclusion that the legislature has intended by Section 165.320, supra, that the secretaries of consolidated school districts be subject to the same statutory provisions which are applicable to the clerks of the school boards of common school districts. This has been recognized by the Supreme Court of the state of Missouri in the case of *Hudgins v. Consolidated School District*, 312 Mo. 1, 1.c. 9, 278 S.W. 769, in which case we find the following:

Honorable Jeremiah Nixon

"The statutes (Sec. 11240, R. S. 1919) authorizing the board of directors of a consolidated school district to elect a clerk or, as therein designated, a secretary, does no more in the creation of that position than to confer the power upon the board to elect; the only limitations contained in the section being in regard to the time of payment of the compensations of the secretary and treasurer. Nor does the law defining the duty and power of a board of directors of a common school in the election and control of a clerk or secretary, made applicable by reference (Sec. 11240) to consolidated schools, do more than to prescribe the duties of such clerk (Sec. 11215), and to confer power upon the board to remove him for dereliction of duty (Sec. 11217). It appears, therefore, that these statutes, in so far as concerns the clerk or secretary of a board are clearly directory. * * *

Section 163.080, RSMo 1949, is a general provision applying to all schools and school districts. This section, providing for the employment of teachers, reads in part as follows:

"* * * The board shall not employ one of its members as a teacher; nor shall any person be employed as a teacher who is related within the fourth degree to any board member, either by consanguinity or affinity, where the vote of such board member, is necessary to the selection of such person; nor shall the teacher serve as a clerk of the district. * * *

(Emphasis ours.)

Therefore, since the statutory provisions applicable to clerks of common school districts are also applicable to the secretaries of consolidated school districts and since Section 163.080 provides that no teacher shall serve as a clerk of the school district, it is our opinion that the school board of a consolidated school district is without authority to appoint a teacher in that district to the post of secretary of the school district.

Honorable Jeremiah Nixon


CONCLUSION

It is, therefore, the opinion of this department that the school board of a consolidated school district cannot appoint a teacher in that district to the post of secretary of the school district.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RHV:ba

LOTTERIES: A newspaper subscription contest, containing the elements of consideration, chance, and prize, is a lottery.

June 29, 1951

Mr. Jeremiah Nixon
Assistant Prosecuting Attorney
Jefferson County
Hillsboro, Missouri



Dear Mr. Nixon:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"I am sending herewith portions of the Jefferson Republic's issue of June 14th, 1951. Please advise as to whether this promotion scheme is a Lottery. I believe the material that I send herewith sufficiently sets out the facts upon which this question is based."

This is a comprehensive plan to build up the subscription list of the said newspaper. It inaugurates a contest which is to run for six and one-half weeks. Two automobiles and various cash prizes are to be given to the winning contestants. Winners of prizes will be determined by the number of votes turned in, said votes being represented by ballots issued on subscriptions and free coupons clipped from the newspaper. Subscribers may cast their votes for any person who has entered the contest. A contestant, in addition to his chance to win a prize, will receive regular commissions on all subscriptions taken by him.

The Constitution of Missouri, in Section 39(9) of Article III, provides that the legislature shall not have power: "To authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery." And the General Assembly has enacted laws, embodied in Sections 563.430 and 563.440, RSMo 1949, in an effort to carry out this mandate.

These statutory provisions, however, do not give a clear-cut definition of the crime, leaving it to the courts to supply the meaning of the term. The Supreme Court of Missouri, in the case of State v. Emerson, 318 Mo. 633, 1.c. 639, said:

Mr. Jeremiah Nixon

"The people in framing the State Constitution (Sec. 10, Art. XIV) declared their disapproval of the establishing of lotteries or schemes of chance in the nature of lotteries, by inhibiting the General Assembly from giving legislative recognition to such schemes. In the discussion and interpretation of this constitutional provision we have held that a lottery includes every scheme or device whereby anything of value is for a consideration allotted by chance. State ex rel. v. Hughes, supra, l.c. 534. In State v. Becker, supra, l.c. 560, in line with our former rulings and those of courts of last resort elsewhere, a more comprehensive definition is given to the word and a lottery or a scheme in the nature of a lottery is held to include every punishable plan, scheme or device whereby anything of value is disposed of by lot or chance."

In the very next paragraph of this opinion the court said: "The crime having been properly charged, the proof of the existence of the elements necessary to establish it are held to be consideration, chance and a prize." These three elements are essential, and the rule is definitely the law in Missouri.

Consideration implies the payment of something of value for the privilege of sharing in the lottery. But the courts have consistently held that such payment need not be a definite purchase of a lottery ticket. It may be merely a transaction connected in some way with the lottery scheme. The use of "free tickets" has been held to imply a sufficient consideration when such tickets are given to induce customers to participate in the scheme. The courts are inclined to suppress any subterfuge or attempt to escape the stigma of being a lottery. We are supported in this conclusion by the following authorities: State v. McEwan, 343 Mo. 213; State ex inf. McKittrick v. Globe-Democrat, 341 Mo. 862; State v. Emerson, 318 Mo. 633; State v. Becker, 248 Mo. 555; State ex rel. Home Planners Depository v. Hughes, 299 Mo. 529.

The promotion plan inaugurated by the Jefferson Republic is based upon payments made for subscriptions, and this without question is sufficient consideration to bring the scheme within the purport of the lottery laws of this state.

The element of chance, as defined by the courts, is a factor that may not appear on the surface of the contest. It may be hidden under the camouflage of skill or services performed. The presence of any degree of chance may be held to reduce the scheme to the penalties of the lottery laws. In the case of State ex inf. McKittrick v. Globe-Democrat, 341 Mo. 862, l.c. 881, the Supreme Court said:

Mr. Jeremiah Nixon

"It is impossible to harmonize all the cases. But we draw the conclusion from them that where a contest is multiple or serial, and requires the solution of a number of problems to win the prize, the fact that skill alone will bring contestants to a correct solution of a greater part of the problems does not make the contest any the less a lottery if chance enters into the solution of another lesser part of the problems and thereby proximately influences the final result. In other words, the rule that chance must be the dominant factor is to be taken in a qualitative or causative sense rather than in a quantitative sense. This was directly decided in *Coles v. Odhams Press, Ltd.*, supra, when it was held the question was not to be determined on the basis of the mere proportions of skill and chance entering in the contest as a whole."

In the State of Oregon a certain company proposed to sell "thrift tickets" and pay cash prizes to such persons as should be selected by the vote of the ticket holders. The Supreme Court of Oregon, in the case of *National Thrift Association v. Crews*, 116 Ore. 352, held this scheme to be a lottery. In the course of that opinion, the court said, l.c. 355, 356:

"* * * Is the element of chance involved? Let us examine the contract. Assume that 25,000 persons each paid one dollar in order to provide funds for a full monthly distribution. Under the terms of this contract \$15,000 would be paid out in prizes, the balance of \$10,000 going to the company. When the money is distributed, 2,500 purchasers get their money back, 1,582 receive something in excess of what they paid, and 20,918 do not receive anything. This scheme reminds us of 'Get-Rich-Quick Wallingford.' It certainly does not have the appearance of a legitimate business enterprise. If, instead of voting these tickets, they were marked with numbers and drawn from a box to determine who would receive the money, would it be contended that the law against lotteries was not violated? The mere fact that the

Mr. Jeremiah Nixon

winners are determined by the number of votes received does not, in this particular scheme, eliminate the element of chance and make it less evil in its tendencies. It is a cleverly designed scheme to evade the law against lotteries and must not be countenanced.***"

In North Carolina a promotion scheme, similar to the one inaugurated by the Jefferson Republic, was held to be a lottery or a gift enterprise by the Supreme Court of the state in the case of Manufacturing Co. v. Benjamin, 172 N.C. 53. In the course of that opinion, the court said, l.c. 54, 55:

"The defendants were to furnish plaintiffs with the names of one hundred and fifty women, who were to be known thereafter as contestants for the prizes offered and later described. The plaintiffs were to notify contestants of their appointment, and the first sixty accepting were to be rewarded with the gift of a 'Queen Esther Spoon.' Each of the one hundred and fifty were to be given a white coupon free to the value of \$10 ordinary coupons. Each of the one hundred and fifty in return was expected to drum up trade among their friends and acquaintances to purchase from defendants, and such purchaser either for cash or payment on account would be given certain tickets, which varied with amount of cash paid. These tickets were delivered to favored contestant or deposited to her credit by purchaser. There were also red tickets for special sales which had an extra value. There were coupon books each of value of \$5 which could be bought for cash, and amount paid for said books was placed to credit of purchaser, to be traded then or later at his convenience, but the coupons in said book could be voted at any contest by the woman contestant to whom same was delivered. Also there was a card of value of \$2.50 to be punched on margin, which, in addition, was worth \$1 to holder for the purchase of any article enumerated on back of same by paying the difference between such value and list price, which ran from 3 cents to \$1.55. A book of instructions was also sent by plaintiffs, which contained the rules of contest.

"This 'Trade Extension Campaign' was to extend over a period of six months. On Wednesday of each week a piece of silver was given the contestant having the

Mr. Jeremiah Nixon

largest number of coupons deposited, and such tickets could be voted in no further weekly contest, and as to them were worthless. Once a month a watch was delivered to the contestant having the largest number of coupons deposited, and all tickets so deposited were worthless at any subsequent monthly drawing. At the end of six months the contestant having the largest number of coupons deposited for the entire campaign received the grand prize of the Grafanola; then the campaign was closed, and all coupons were worthless in the hands of all except the fortunate winners at the weekly, monthly, and final contests. This is a concise statement of the scheme as disclosed by the evidence.

"The defendants made the notes and executed the contract and received the various articles to be offered as prizes described in contract.

"Awaiting the coming of plaintiff's representative, who was to open the campaign, the prizes were displayed in defendants' show windows, when they were advised by the county solicitor if they went forward with this plan they would be indicted for conducting a lottery. Defendants at once advised plaintiff of the situation, and offered to return prizes and cancel contract, which offer they have kept good to date, but plaintiff refused to accept offer, and demanded that contract be carried out.

"His Honor held upon all the evidence that the scheme came within the purview of section 3726 of the Revisal as a gift enterprise, that the consideration for the notes was illegal, and that plaintiff cannot recover.

"It is immaterial whether this scheme to enlarge defendants' business is a lottery or a gift enterprise, as both are prohibited by the law. We concur with the judge that the scheme falls under the denunciation of the statute, and, therefore, the consideration for the notes is illegal, and plaintiff cannot recover.

Mr. Jeremiah Nixon

"Schemes of this character are so numerous that it would tax the ingenuity of man to define with accuracy and to draw the line clearly between those which are devised to evade the laws made for the protection of an unwary public and those which are bona fide and harmless methods of advertising a legitimate business."

The contest promoted by the Jefferson Republic may appear at first thought to be free from any possibility of chance. But out of the scheme may evolve a most vicious gambling contest, inasmuch as the contestants could purchase large blocks of subscriptions for the sole purpose of increasing their chances of winning a prize. A situation such as this could easily develop in the final stages of the contest. The element of chance is very definitely embodied in the plan.

The prize element is certainly included in the promotion scheme of the newspaper, since two automobiles and various cash prizes are offered to the winners. No further proof is necessary.

CONCLUSION

It is the opinion of this office that the promotion scheme of the Jefferson Republic, containing the essential elements as defined by the courts, is a lottery.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

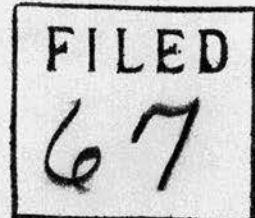
BATab

SHERIFF, MILEAGE: The sheriff is entitled to mileage at the rate of ten cents per mile for taking a patient to a state hospital.

October 3, 1951

10/4/51

Mr. Jeremiah Nixon
Assistant Prosecuting Attorney
Jefferson County
Hillsboro, Missouri



Dear Mr. Nixon:

We have given careful consideration to your request for an opinion, which request is as follows:

"The Sheriff of Jefferson County, Missouri, recently took a girl from this County to the State Institution for the feeble minded at Fulton, Missouri. This girl had been adjudicated of unsound mind. Please advise as to whether the Sheriff can submit a bill to the County Court of Jefferson County, Missouri, for his costs in this matter and if so, how much per mile does the law allow in this situation."

We assume from the wording of your letter that the girl taken by the sheriff to the state hospital at Fulton, Missouri, was a patient of Jefferson County.

Section 202.440, RSMo 1949, is as follows:

"To the sheriff or other person, for taking a patient to a state hospital or removing one therefrom, upon the warrant of the clerk, mileage going and returning, at the rate of ten cents per mile, and one dollar per day for the support of each patient on his way to or from the hospital shall be allowed; to each assistant allowed by the clerk and accompanying the sheriff, or other person acting under the warrant of the clerk, four

Mr. Jeremiah Nixon

dollars per day for the time actually consumed in making said trip said sum, to include all expenses of such assistant. The computation of mileage in each case is to be made from the place of arrest to hospital by the nearest route usually traveled; provided, that the said sheriff shall furnish all necessary means of transportation without charge other than as above allowed. The cost specified in this section shall be paid out of the county treasury of the proper county."

We fail to find any court interpretations of this statute, but the wording of the law is clear. The problem stated in your letter is resolved by application of this section of the statutes.


CONCLUSION

It is the opinion of this office that the sheriff of Jefferson County may submit a bill to the county court for expenses incurred in taking a county patient to the state hospital at Fulton, Missouri, and is entitled to mileage at the rate of ten cents per mile as provided in Section 202.440, RSMo 1949.

Respectfully submitted,

APPROVED:

B. A. TAYLOR
Assistant Attorney General

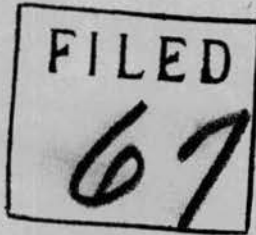


J. E. TAYLOR
Attorney General

BAT/fh

COUNTY BUDGET: County court cannot pay salaries of
deputy sheriffs out of class two funds
DEPUTY SHERIFFS: of county budget.

October 16, 1951



10-16-51

Honorable Jeremiah Nixon
Assistant Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

This is in answer to your letter of recent date
requesting an official opinion of this department and
reading as follows:

"The Honorable Judge Edward T. Ever-
sole, Judge of the 21st Judicial
Circuit, has authorized the hiring of
two additional deputy sheriffs for
Jefferson County, Missouri. These
deputy sheriffs are to work full time.
He has also authorized an increase
in salary of \$50.00 per month for
the three present full time deputy
sheriffs. Jefferson County is a
county of the third class with approxi-
mately 38,500 population. Of course,
there was no provision made for these
two new men in the budget submitted
by the Sheriff to the County Court
and approved in January of this
year by the County Court. The County
Court allocated roughly \$6400.00
at the first of the year in the
class two funds for specially called
elections. The question has been
raised as to whether the County Court
would have any authority to pay these
new deputies out of this money that
is in the election account. If they
do have this authority, and if they
do use the money out of this fund

Honorable Jeremiah Nixon

October 16, 1951

and it became necessary to hold a special election, would the County Court be authorized to issue Warrants redeemable next January, to finance the election?"

Jefferson County is a county of the third class and is governed by the provisions of Sections 50.670 and 50.740, RSMo 1949, insofar as the county budget is concerned.

Section 50.710, RSMo 1949, provides in part as follows:

"The court shall show the estimated expenditures for the year by classes as follows:

* * * * *

"Class 2. Expense of conducting circuit court and elections, not to include the salary of any officer or employee on a yearly salary nor deputy or assistant of any kind whatever though on irregular time, such shall be estimated for under class four. Class two shall include pay of jurors, witnesses if properly paid by the county, and other incidental court costs, pay of judges and clerks of elections and all other expense of elections chargeable against the county. This estimate shall not be less than last preceding even year in even years and last preceding odd year in odd numbered years."

Since the moneys in class two are to be used only for the purposes set out in the quoted portion of Section 50.710, it is clear that during the budget year money so budgeted cannot be used to pay for the salaries of deputy sheriffs.

CONCLUSION

It is the opinion of this department that the salaries of deputy sheriffs in a county of the third class cannot

Honorable Jeremiah Nixon

October 16, 1951

be paid from the moneys budgeted in class two of the county budget.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

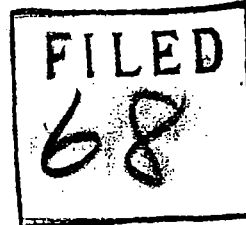
J. E. TAYLOR
Attorney General

CBB:lrt

ELECTIONS: Parolees under Section 549.170, R.S. Mo. 1949, and persons discharged by certificate under Section 217.370, R.S. Mo. 1949, entitled to vote in Missouri.

January 25, 1951

Mr. John W. Oliver, Chairman
Board of Election Commissioners
County Court House
Kansas City 6, Missouri



Dear Mr. Oliver:

We are in receipt of your recent request for an official opinion on each of the following questions:

Question 1.

"Is a person qualified to vote in Missouri, who, in the absence of a pardon from the Governor, was under the age of 20 years when convicted of any crime in which reference is made in Section 4561, Mo. R.S. 1939, as revised in 1949?"

Section 4561, R.S. Mo. 1939 (Section 560.610, R.S. Mo. 1949) is worded as follows:

"Any person who shall be convicted of arson, burglary, robbery or grand larceny, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this chapter, shall be incompetent to serve as a juror in any cause, and shall be forever disqualified from voting at any election or holding any office of honor, trust or profit, within this state; provided, that the provisions of this section shall not apply to any person who at the time of his conviction shall be under the age of twenty years; provided further, that in all cases where persons have been convicted under this chapter the disqualification provided may be removed by the pardon of the governor at any time after one year from the date of conviction."

This statute excludes from voting at any election within the state persons convicted of certain crimes against property. It is provided, however, that the provisions of this law shall not apply to persons under twenty years of age at the time of conviction. This seems to answer your question. But another section of the law, the one defining voting

Mr. John W. Oliver

qualifications, must be taken into consideration. This is Section 11469, R.S. Mo. 1939 (Section 111.060, R.S. Mo. 1949), which reads as follows:

"All citizens of the United States, including residents of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people. Each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides. No idiot, no insane person and no person while kept in any poorhouse at public expense or while confined in any public prison shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of a felony, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

This section makes no exception in favor of persons under twenty years of age. It prohibits from voting all persons convicted of a felony unless granted a full pardon. This means all felonies, including those embraced in Section 560.610. It seems, therefore, that these two sections are in some respects in conflict. For example, a person under twenty years of age convicted of grand larceny, without pardon, would be disqualified from voting under Section 111.060. But under Section 560.610 he would not be deprived of the right to vote.

When two statutes, dealing with the same subject, are inconsistent with each other, so that both cannot be applied, the latter act will be held as a substitute for the former one and will operate as a repeal of any portion of the former statute that may be in conflict with the latter enactment. This principle of law is sustained by the great weight of authority. *State ex rel Mo. Pac. Ry. Co. v. Pub. Serv. Comm.*, 275 Mo. 60, 204 S.W. 395; *Gasconade County v. Gordon*, 241 Mo. 569, 145 S.W. 1160; *Miners' Bank of Cartersville v. Clark*, 216 Mo. App. 130, 257 S.W. 139.

The proviso exempting persons convicted of felony under twenty years of age, incorporated in Section 560.610, was enacted in

Mr. John W. Oliver

1899 (Laws of Mo. 1899, p. 165). The substance of Section 111.060 was enacted in 1879 (Section 5492, R.S. Mo. 1879). Section 560.610, therefore, is the latter enactment and holds validity over the former act insofar as the two are inconsistent.

CONCLUSION

A person being under twenty years of age when convicted of any crime to which reference is made in Section 560.610, R.S. Mo. 1949, without pardon from the governor, is not disqualified as a voter in Missouri.

Question 2.

"Is a person qualified to vote in Missouri, who, in the absence of a pardon from the Governor, was convicted of a felony or a misdemeanor connected with the exercise of the right of suffrage, but has received his final discharge under the provisions of Sections 4199 to 4211, inclusive, R.S. Mo. 1939?"

These sections, now incorporated in the Revised Statutes of Missouri, 1949, as Sections 549.060 to 549.180, provide judicial process for the release of persons convicted of crimes under the laws of the State of Missouri, giving the courts broad powers in matters of parole. Section 549.170 states that "Any person who shall receive his final discharge under the provisions of Sections 549.060 to 549.180, shall be restored to all the rights and privileges of citizenship."

The Constitution of Missouri, Article VIII, Section 2, gives all citizens over twentyone years of age, except those specifically excluded, the right to vote at all elections by the people. The right to vote, therefore, is a right or privilege of citizenship. Hence, it seems clear that any person who shall receive his final discharge under parole procedure should no longer be deprived of the right to vote.

Section 549.170, however, seems to be in conflict with Section 111.060, insofar as it provides a way in which a convicted person may be restored to the right to vote without having been granted a full pardon. But Section 549.170 was enacted in 1897 (Laws of Mo. 1897, p. 73), while Section 111.060 was incorporated in the Revised Statutes of Missouri, 1879, as Section 5492. Section 549.170, therefore, is the latter enactment and holds validity over the former act insofar as the two are inconsistent.

There is, moreover, a constitutional question involved. Some authorities hold that the parole system described above

Mr. John W. Oliver

is an infringement upon the governor's pardoning power. They contend that the chief executive of the state is vested with exclusive authority to release persons convicted of crime, or to restore their rights of citizenship. The legislature, we are told, cannot invade the province of the governor by passing measures to establish parole authority and procedure. Neither can the courts take jurisdiction in such matters.

This doctrine is upheld in a decision handed down by the Supreme Court of Missouri in 1883. *State v. Grant*, 79 Mo. 113. In the course of that opinion the court said:

"I take it that when the statutes annex certain disabilities, the loss of certain civil rights, to the conviction of a crime, and a conviction of that crime thereafter occurs, that thereupon by force and operation of the law and of the judgment of conviction the disabilities become welded to the crime, forming thereby an indivisible integer incapable of separation by any exertion of legislative power. And this is especially true under a constitution such as ours. The position here taken is plainly this: That the pardoning power is vested by our constitution alone in the governor; that aside from the reversal of the judgment in a criminal cause, the only method of relief from the disabilities annexed to such judgment is by a full pardon of the offense, and that, while the crime itself remains unpardoned, the disabilities annexed thereto will remain unaltered and unaffected by any legislative act."

This opinion has never been followed as good law in Missouri. Under its injunction there could be no parole system in this state. There could be no release of convicts for good behavior during their terms of service. But as a matter of fact, the legislature has given us a great body of laws governing the authority and process of parole and the release of prisoners. And the courts by indirection have sustained these laws.

The contention that the governor's pardoning power gives him exclusive control over paroles, discharge of prisoners, restoration of citizenship, and other related subjects, is without foundation. Section 7, Article IV, Constitution of Missouri, 1945, reads as follows:

"The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole."

Mr. John W. Oliver

It should be noted that this grant of power is by no means absolute. It does not include the power to parole. The function of parole, therefore, is not vested in the governor and may be established by legislative act. There is nothing in the Constitution to restrain the legislature from enacting laws for the purpose of rehabilitating and discharging convicted persons and prisoners and restoring their rights of citizenship. And the general assembly has full power to invest the courts and administrative bodies with proper authority to make these laws effective.

CONCLUSION

A person convicted of a felony or a misdemeanor connected with the exercise of the right of suffrage, having received his final discharge under the provisions of Sections 549.060 to 549.180, R.S. Mo. 1949, without pardon from the governor, is not disqualified as a voter in Missouri.

Question 3.

"Is a person qualified to vote in Missouri, who, in the absence of a pardon from the Governor, was convicted of a felony, but has received a certificate of discharge under the provisions of Section 9086, R.S. Mo. 1939?"

This section, now incorporated in the Revised Statutes of Missouri, 1949, as Section 217.370, reads as follows:

"Any convict who is now or may hereafter be confined in the penitentiary or the intermediate reformatory and who shall serve three-fourths of the time for which he or she may have been sentenced, in an orderly and peaceable manner, without having any infraction of the rules of the institution or laws of the same recorded against such convict, shall be discharged in the same manner as if said convict had served the full time for which sentenced, and in such case no pardon from the governor shall be required; and in all cases of first conviction of felony the civil disabilities incurred thereby shall cease at the end of two years from such discharge under the three-fourths rule, and such convict shall thereupon be restored to all the rights of citizenship; provided, that he or she shall not have been indicted, informed against by the prosecuting or circuit attorney, or convicted of any other crime, during such period, and shall obtain a certificate to that effect from the board of probation and parole, whose duty it shall be, upon proper showing, to issue the same and keep a record thereof."

Mr. John W. Oliver

This is known as the three-fourths rule and provides for the release of convicts on a record of good conduct without a pardon from the governor. It also opens the way, without pardon, for the restoration of all the rights of citizenship, including the right to vote.

This section, however, seems to be in conflict with Section 111.060, insofar as it provides a means by which a convict may be restored to the right to vote without having been granted a full pardon. But Section 217.370 was enacted in 1897 (Laws of Mo. 1897, p. 73), while Section 111.060 was incorporated in the Revised Statutes of Missouri, 1879, as Section 5492. Section 217.370, therefore, is the latter enactment and holds validity over the former act insofar as the two are inconsistent.

The constitutionality of this statute also may be challenged on the ground that it encroaches upon the governor's pardoning power. But such arguments cannot be sustained for the reasons given in our answer to Question 2. Moreover, the Supreme Court of Missouri in *State v. Austin*, 113, Mo. 538, 21 S.W. 31, stated that when a "convict was discharged under the three-fourths rule, no pardon from the governor was necessary." And other cases by indirection support the statute. *Ex parte Rody*, 348 Mo. 1, 152 S.W. 2d 657; *Ex parte Carney*, 343 Mo. 556, 122 S. W. 2d 888.

CONCLUSION

A person convicted of a felony for the first time, having received his discharge under the three-fourths rule provided in Section 217.370, R. S. Mo. 1949, having received his final certificate as proof of good behavior for two years after said discharge, and having thereupon been restored to all the rights of citizenship, without pardon from the governor, is not disqualified as a voter in Missouri.

Question 4.

"Does the term 'felony or misdemeanor connected with the exercise of the right of suffrage' include felonies and such misdemeanors defined under (1) the laws of the United States, or (2) under the laws of any other state?"

This is a reference to Section 111.060, R. S. Mo. 1949, supra, which provides that no person convicted of such crimes shall be permitted to vote unless granted a full pardon. The meaning of the terms in question is not clearly expressed in the text of the statute. No attempt is made, however, to confine such crimes to the laws of Missouri. Any such interpretation would work discrimination against the people of our own state. Evidently the legislature intended to include such crimes committed anywhere and under any jurisdiction. This meaning of the statute was sustained by the Supreme Court of Missouri in

Mr. John W. Oliver

1943 in the case of State v. Sartorius, 175 S.W. 2d 787.

CONCLUSION

The terms "felony or misdemeanor connected with the exercise of the right of suffrage" include felonies and such misdemeanors defined under the laws of the United States or under the laws of any other state.

Question 5.

"If the above is answered affirmatively, does reference to 'a full pardon' relate to the pardoning power (1) under the United States, or (2) under the laws of any other state?"

This also is a reference to Section 111.060, R.S. No. 1949, in which "a full pardon" is required to restore the voting rights of a convicted person. By implication of the ruling in the case of State v. Sartorius, supra, it seems clear that the pardoning power of the jurisdiction in which the law is in force should apply in any case. The laws of the United States and of other states provide pardoning power and invariably the authority is vested in the chief executive.

CONCLUSION

The term "a full pardon" applies, not only to the laws of Missouri, but relates also to the pardoning power under the United States or under the laws of any other state.

Question 6.

"Does the conviction of a felony or of a misdemeanor connected with the exercise of the right of suffrage, after a full pardon for a prior similar conviction, forever exclude such person from voting?"

Section 111.060, supra, referring to a person previously found guilty, declares that "after a second conviction of felony or misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting." The wording of this statute is plain, and the meaning seems to be entirely clear. We fail to find any conflicting laws or contrary court decisions.

CONCLUSION

The second conviction of a felony or of a misdemeanor connected with the exercise of the right of suffrage excludes forever the person thus convicted from voting, even though he has received a full pardon for the prior similar offense.

Mr. John W. Oliver

Question 7.

"Does the effect of conviction of a disfranchising crime continue after repeal of the law which declared the same to be a crime?"

The repeal of a criminal statute is not retroactive. It revokes the law but gives no relief to persons who have already violated it. This well-known principle is supported by the great weight of authority. *State v. Mathews*, 14 Mo. 101; *State v. Ross*, 49 Mo. 416; *State v. Walker*, 221 Mo. 511, 120 S.W. 1198.

CONCLUSION

The effect of conviction of a disfranchising crime continues after repeal of the law which declared the same to be a crime.

Question 8.

"When does a person become 21 years of age with reference to Section 11469, R.S. Mo. 1939?"

By accurate computation of time a person becomes twenty-one years of age on the twenty-first anniversary of his birth. But the law makes a peculiar exception to any such mathematical conclusion. "In determining when a person arrives at this age, most states have adopted the common-law rule that one is twenty-one years old on the day preceding the twenty-first anniversary of his birth." 18 Am. Jr. 215. This doctrine is clearly defined in *Erwin v. Benton*, 120 Ky. 536, 87 S.W. 291. The common-law rule seems to be the rule in Missouri.

CONCLUSION

A person becomes twenty-one years of age and eligible to vote in Missouri on the day preceding the twenty-first anniversary of his birth.

Question 9.

"What are the rules for determining when a person is an idiot or insane person?"

There is no distinction between persons of unsound mind, irresponsible person, idiots, or insane persons. In law these terms have the same meaning. But no definite set of rules has been formulated to define this meaning. There are many cases, however, bearing on the subject. *Heard v. Sack*, 81 Mo. 610; *Prentiss v. Ill. Life Ins. Co.*, 225 S.W. 695; *In re Crouse*, 140 Mo. App. 545, 120 S.W. 666; *Sampson v. Pierce*, 33 S.W. 2d 1039; *In re Bearden*, 86 S.W. 2d 585.

Mr. John W. Oliver

CONCLUSION

An idiot or insane person is one whose mental condition reduces the individual to a total lack of understanding. To disqualify one from voting, there must be such mental impairment as to render the person incapable of understanding the ordinary affairs of life. A person whose mind is merely enfeebled by age should not be disqualified. Election officials should exercise discretion and caution when confronted with such questions.

It is our candid opinion that Sections 4210 and 9086, R.S. Mo. 1939 (Sections 549.170 and 217.370, R.S. Mo. 1949), are not unconstitutional and should be obeyed by administrative officers whose duties are involved. You are hereby advised to act in accordance with the conclusions herein made in answer to your questions.

Respectfully submitted,

E. A. TAYLOR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

BATab

CONSERVATION : Anyone operating a device consisting of gas motor
COMMISSION : operating a generator producing electric current
FISH AND GAME: connected to submerged wires injuring or killing
CRIMINAL LAW : fish is ^{not} subject to prosecution under Section
252.220, RSMo 1949.

October 23, 1951

11-13-51

Honorable H. F. Owen, Jr.
Prosecuting Attorney
Taney County
Forsyth, Missouri



Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads:

"Request Official Opinion of your Department regarding whether or not prosecution may be had under section 252.220, R. S. 1949, as to the taking of fish by means of an electrical device.

"This device consists of a gasoline motor operating a generator that produces a current of approximately 110 volts, with the wires being strung from one boat to another boat through the water and across the stream.

"This device is as effective, if not more so, than explosives prohibited under the above section, in taking fish in very great numbers."

Your request requires a construction of Section 252.220, RSMo 1949, which reads:

"1. It shall be unlawful for any person to place any explosive substance or preparation in any of the waters of this state, whereby any fish which may inhabit said waters may be killed, injured or destroyed; and no person, by any such means, shall kill, catch or take any fish from said waters; provided, however, that explosive substances or preparations may be used in said waters, but only with the permission and under the supervision of the commission.

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"2. Any person violating any of the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be fined not less than two hundred dollars, nor more than one thousand dollars, or by imprisonment in the state penitentiary for not more than two years, or by both such fine and imprisonment for each such offense."

The question you present is whether anyone operating a device consisting of a little gas motor operating a generator which produces current in an amount equal to 110 volts connected to submerged wires strung from one boat to another boat carrying the electricity is violating Section 252.220, supra, and subject to prosecution thereunder. It is conceded that such a device so operated will injure and kill fish.

A primary rule of statutory construction is to ascertain from the language of the act the intent of the Legislature, if possible, and give it that meaning (see *Meyering v. Miller*, 51 S.W. (2d) 65, 330 Mo. 885.).

Section 252.220, supra, to a great extent, is taken from old Sections 8926 and 8927, RSMo 1939, which were outright repealed by the Legislature in the bill containing Section 252.220, supra. Those statutes read as follows:

"The use of dynamite or explosives in any of the waters of this state is prohibited except by the special permission and under the supervision of the state game and fish commissioner, and then only for mining or mechanical purposes, or to recover the bodies of persons. Any person, firm or corporation offending against any of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars nor more than one thousand dollars for each offense."

"No person shall place or use in any of the waters of this state any medical drug, any coccus indicus, or fish berry, or any other poisonous thing or substance, calculated to poison, kill, or injure any fish, nor shall by such means kill, catch or take any fish that may be in said waters, and no person shall place any dynamite, giant powder, nitroglycerin, or any explosive substance

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of which nitroglycerin composes a part, or any other explosive substance or preparation in any of the waters of this state, whereby any fish that may be in said waters may be killed, injured, or destroyed, and no person by any such means shall kill, catch or take any fish from said waters. Any person who shall violate any of the provisions of this section, shall on conviction be adjudged guilty of a felony and punished by imprisonment in the penitentiary for a term not exceeding two years, or by imprisonment in the county jail not less than thirty days, or by fine not less than one hundred dollars (\$100.00), or by both such fine and imprisonment."

It is well established that the presumption is that the Legislature, in changing a statute, does so with full knowledge of the court's construction of said statute. *State ex rel. Kelsey v. Smith*, 75 S.W. (2d) 832, 335 Mo. 1125. Also, the words used in a statute must be read in light of amendments to the original enactment. *Wallace v. Woods*, 102 S.W. (2d) 91, 340 Mo. 452. Furthermore, it has been held in determining the meaning of doubtful terms in a statute that the court may be aided by the legislative use of terms in other statutes. 50 Am. Jur., Section 265, page 255. In view of the above, it appears that the General Assembly was more or less attempting to consolidate Sections 8926 and 8927, supra, providing one penalty in lieu of a misdemeanor and graduated felony as it was prior to the enactment of Section 252.220. Sections 8926 and 8927, supra, dealt almost entirely with explosives. It specifically provided that no person shall place any dynamite, giant powder, nitroglycerin or any explosive substance of which nitroglycerin composes a part, or any other explosive substance or preparation in any waters of this state. Had the Legislature intended Section 252.220 to cover fishing with a generator connected to submerged wires, it could have left out "explosive substance" and used in lieu thereof "any preparation whatsoever," which would have been all inclusive. Certainly the legislative intent was to confine Section 252.220 to explosives and nothing more, and where it reads "explosive substance or preparation," it means an explosive preparation, and such a device cannot possibly be construed as an explosive preparation.

In *Henderson v. Massachusetts Bonding & Insurance Co.*, 85 S.W. (2d) 922, 1.c. 924, 925, the court cited many authorities

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in defining explosives and held that a public liability policy covering a variety store, excepting liability for explosives kept or sold on the premises, did not exempt the insurer from liability for death caused by explosion of fireworks in the store, as fireworks were not included in the classification with explosives. In so holding, the court said:

" * * * Generalities usually make ambiguities. The insurer can always prevent the necessity of strict construction against it, or any construction at all, by stating the terms of any provision so clearly, definitely, and specifically as to make its meaning so plain that no room is left for construction. This, appellant here did not do in the statement that 'no explosives are made, sold, kept or used on the insured premises.' Is there not a difference between 'explosives,' as used and sold commercially, and articles which are not ordinarily designated as 'explosives,' but which do contain some explosive material? What would the average business man think this meant when reading it in his policy? Shotgun shells, rifle cartridges, firecrackers and Roman candles? We think not. There is no doubt that gunpowder is an explosive. Shotgun shells and rifle cartridges contain gunpowder, but would any merchant consider that such a prohibition against explosives would prohibit him from carrying in his store rifle cartridges and shotgun shells? Is not the same thing true of fireworks? Fireworks have been given the following definition: 'A contrivance of inflammable and explosive materials combined of various proportions for the purpose of producing in combustion beautiful or amusing scenic effects, or to be used as a night signal on land or sea or for various purposes in war.' 2 Bouv. Law Dict. 1232. An explosive is 'a compound or mixture susceptible of explosive chemical reaction, as gunpowder or nitro glycerine.' Webster's Dictionary."

We are also confronted with the rule of statutory construction that statutes penal in nature must be strictly construed. That is to say, they will not be regarded as including anything not clearly or intelligently described in the words thereof and

Honorable H. F. Owen, Jr.

manifestly intended by the Legislature. In other words, they are to be liberally construed in favor of the defendant and strictly against the state as to the charge and proof. See State ex inf. Collins v. St. Louis-San Francisco Railway Co., 142 S.W. 279, 238 Mo. 605, and State v. Taylor, 133 S.W. (2d) 336, 345 Mo. 325. In view of the foregoing, we cannot believe it was ever the legislative intent in passing Section 252.220, supra, to make that apply to persons fishing in the manner prescribed in your request.


CONCLUSION

Therefore, it is the opinion of this department that no person can be prosecuted under Section 252.220, RSMo 1949, for fishing with such equipment.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

ARR:VLM

COUNTY ASSESSOR,) The county assessor under House Bill No. 700
) is authorized to expend for clerical help as
) much as six hundred dollars (\$600.00) during
CLERICAL HELP:) the calendar year of 1951.



November 27, 1951

11-28-51

Mr. Robert B. Osborn
Assistant Prosecuting Attorney
Reynolds County
Centerville, Missouri

Dear Mr. Osborn:

We have given careful consideration to your request for an opinion, which request is as follows:

"Confirming my telephone conversation with you a few moments ago pertaining to House Bill #70, salaries for assistant or stenographer for assessors in Counties three or four.

"Will you please send us an opinion, by Monday of next week if possible, holding whether or not the County Court is bound to pay the County Assessor's assistant or his stenographer the full salary of \$600.00 per annum for the year 1951 or whether they should pay that part of the \$600.00 per annum salary as fixed by house bill No. 70, which became effective October 9, 1951."

House Bill No. 70 was passed by the 66th General Assembly of Missouri and became effective as a law of the state on the 9th day of October, 1951. The full text of this statute is as follows:

"The county assessor in each county of classes three and four may appoint and fix the compensation of such

Mr. Robert B. Osborn

clerical or stenographic assistants as may be necessary for the efficient performance of the duties of his office. The compensation of such clerical or stenographic assistants shall be paid from the county treasury and shall not exceed six hundred dollars per annum in counties of class three nor six hundred dollars per annum in counties of class four."

The meaning of this law, stated in rather brief form, is not entirely clear. In such case the courts have held that the rule of reason should apply. In Dahlin v. Missouri Commission for the Blind, 262 S.W. 420, at page 423, the Springfield Court of Appeals holds that if a statute is not clear, "and there is any room for construction, then the reason and sense of the statute will control in determining its meaning."

It would not be a reasonable conclusion to hold that the assessor should spread the sum of six hundred dollars out over a full period of twelve months. That would reduce the salary of his assistant to a pauper's allowance of fifty dollars per month. Evidently the legislature intended to give the assessor authority to use as much as six hundred dollars per annum in the employment of clerical help at such times during the year as he may deem necessary or proper.

The term "per annum," as defined in Webster's Dictionary, means "by the year; each year." The word "year," as defined in Section 1.020, RSMo 1949, "shall mean a calendar year unless otherwise expressed . . ." The calendar year, then, is the intention of House Bill No. 70, and the assessor is authorized to expend for clerical help as much as six hundred dollars in any calendar year. The law is now in effect, and the present year is included under the terms of the act.

CONCLUSION

It is the opinion of this office that under House Bill No. 70 the county assessor in a county of the third or

Mr. Robert B. Osborn

fourth class is authorized to expend for clerical or stenographic assistants as much as six hundred dollars of the county funds during the calendar year of 1951 for services performed after the effective date of the act.

Respectfully submitted,

APPROVED:

B. A. TAYLOR
Assistant Attorney General

J. E. TAYLOR
Attorney General

BAT/fh

SCHOOLS: Person who has contracted to transport school children to and from school not excused from supplying said transportation due to bad weather conditions.

January 2, 1951

Honorable James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri



1-4-51

Dear Sir:

Your letter at hand requesting an opinion of this department, which, in part, reads:

"Where a school district employs and hires a private individual to furnish transportation for the students attending that particular school, said busses to travel over a designated route, what is the responsibility of the person so employed to furnish transportation, to pick up or deliver the child at its designated place of pick up and delivery, where, because of high water, sleet, ice, or snow, that it is impractical for the person furnishing the transportation to follow the designated route?"

At the outset, we observe that your question relates to the responsibility of a person employed to furnish transportation to pick up or deliver children at designated places where, because of the elements as you have set out, it is impractical for him to do so, and the facts which you relate do not indicate that it is entirely impossible for the person so employed to follow the designated route in furnishing such transportation.

It is possible that your question presents more of a practical one which might be worked out between the school board and bus driver, with the aid of the county superintendent of schools. While you do not state what type of school district is involved in the particular situation, we call your attention to Section 10327-a, Laws of Missouri, 1947, Vol. I, page 497, which provides for the solving of transportation problems in connection with common school districts, and, in part, reads:

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"The county superintendent of schools in each county of the state shall act as supervisor of school transportation established by common school districts. It shall be his duty to confer with and advise the school boards of common school districts of his county in all matters pertaining to school transportation and he shall assist such school boards of his county in establishing routes and contracting with drivers, and his office shall be available to the school boards in his county for meetings for the purpose of solving their transportation problems. * * *"

Section 10326, R.S. Mo. 1939, provides for the procedure to be followed in order that free transportation may be furnished to school children to and from school, and empowers the board of directors or Board of Education to arrange for and provide such transportation after the same has been voted by the taxpayers within the district. The statute then, in part, provides:

"The board of directors or board of education shall have authority and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board."

In view of the above-quoted provisions of the statute it would seem that the school board would be empowered to make specific rules and regulations that would remedy the situation which you have presented in your letter.

It is also our thought that a person who has contracted for and undertaken to furnish the transportation of school children to and from school would certainly not be excused from furnishing said transportation due to the elements or inclement weather. As a matter of fact, during these times the transportation is probably of most importance to the children. While we can understand that bad weather conditions might make it extremely difficult for the school bus driver to travel the roads in order to transport pupils, he would not be excused from furnishing said transportation because of such difficulty. We

Honorable James L. Paul

believe that his failure to transport the children would probably render him liable on his bond, which we assume was required and was furnished in compliance with Section 10326, supra.

It is our further thought that the services of the person in question to supply transportation for the school children were contracted for and that a definite agreement or contract exists between such person and the school district. Such being the case, the bus driver, in failing to provide transportation for the pupils for the reasons as set out in your request, would constitute a breach of contract for which he would be liable.

CONCLUSION

It is therefore the opinion of this department that a person who has contracted with a school district to supply transportation of school children to and from school is not excused from transporting said children because of bad weather conditions which may render it impractical to do so, but which conditions do not render it impossible to transport such children.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

PROSECUTING ATTORNEY:
INTERMEDIATE REFORMATORY:

Must comply with section 217.170 requiring certain information be furnished superintendent of intermediate reformatory regarding prisoner delivered for confinement therein.

March 20, 1951.

Honorable James L. Paul,
Prosecuting Attorney
McDonald County,
Pineville, Missouri,



Dear Sir:

This will acknowledge receipt of your request for an opinion from this office on a question which you present as follows:

"For the past two years, it has been the policy of the judges in this circuit and of this office, that where there is a plea of guilty, or where it is known a plea of guilty is to be entered by a prisoner to a crime of which he stands charged, to require a pre-sentence investigation by the State Board of Parole and Probation, to ascertain whether or not the subject is eligible for parole, and if so to work out a parole plan.

"In some instances, such a parole plan cannot be accomplished and in other instances, even though a parole plan is accomplished and subject placed on parole, there have been times when it has been necessary to revoke the parole. In any of these instances where the subject is committed to either the Intermediate Reformatory at Algoa, or to the Missouri Penitentiary, this office, although well acquainted with Section 9121 of the Revised Statutes of the State of Missouri, has made a very brief commitment report and advised the institution that a pre-sentence investigation is on file, feeling that the pre-sentence investigation which goes into detail, is so much more valuable in properly classifying them, than a hurried statement by this office which has been made by minor contact with the subject. However, this office has recently received instructions from the Intermediate Reformatory, that unless the law is complied with, that inmates will not be accepted unless there is a Prosecuting Attorney's statement, accompanying the commitment papers.

"Advise this office that in instances where there is on file with the State Board of Parole and Probation

Hon. James L. Paul,

a complete pre-sentence investigation in cases where parole plans cannot be worked out, and where there is in addition to the pre-sentence investigation, a parole violation on file with the Parole and Probation Department, if Section 9121 of the Revised Statutes of the State of Missouri, must be conformed with, to the extent of a complete statement where at the time of commitment, the institution is advised of the previous report."

The Section 9121, R. S. Mo. 1939, to which you refer in your letter was incorporated with Section 9057, R. S. Mo. 1939, by Senate Bill 1069 of the 65th General Assembly and may be found as Section 217.170, RSMo 1949, reading as follows:

"1. Whenever any convict shall be delivered to the division for confinement in either the penitentiary or the intermediate reformatory, the officer delivering such convict shall deliver to the warden or the superintendent a certified copy of the sentence received by such officer from the clerk of the court and shall take from the warden or superintendent a certificate of delivery of such convict.

"2. In addition to the certified copy of the sentence, the officer delivering the prisoner to the intermediate reformatory shall furnish the superintendent information regarding the prisoner covering his age, crime for which committed and circumstances thereof, personal history of prisoner including such facts regarding his home environment and his habits of industry as shall be helpful to the superintendent; also a statement covering his previous crimes, convictions and commitments.

"3. It shall be the duty of the prosecuting attorney in the respective counties and the circuit attorney in the city of St. Louis to prepare and furnish such statement to the officer delivering such offender to the intermediate reformatory."

In construing a statute one of the primary rules of construction is to determine the intention of the Legislature in enacting the statute as that intent is expressed in the act. This rule was reiterated by the Supreme Court of Missouri in the case of American Bridge Co. v. Smith, 179 S.W. (2d) 12, 1.c. 15, as follows:

"The primary rule of construction of statutes is to ascertain the lawmakers' intent from the words used if possible; and to put upon the language of

Hon. James L. Paul,

the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object,* * *."

The section to which we refer above directs that whenever any convict shall be delivered to the division of penal institutions for confinement in either the penitentiary or the intermediate reformatory, the officer delivering such convict shall deliver to the warden or superintendent a certified copy of the sentence received by such officer from the clerk of the court and shall take from the warden or superintendent a certificate of delivery of such convict. There appears to be no confusion as to the clearly stated mandate of the Legislature in directing the procedure outlined above.

In addition to the certified copy of the sentence, the officer delivering a prisoner to the intermediate reformatory is required, in the words of the statute, "he shall furnish the superintendent information regarding the prisoner covering his age, crime for which committed and circumstances thereof, personal history of prisoner, including such facts regarding his home environment and his habits of industry as shall be helpful to the superintendent; also a statement covering his previous crimes, convictions and commitments." This directive appears also to be clearly enough expressed to be easily understood. Herein is outlined the information which is required to be furnished the superintendent of the intermediate reformatory by the officer delivering the prisoner.

Paragraph 3 of said section directs that it shall be the duty of the prosecuting attorney in the respective counties and the circuit attorney in the city of St. Louis to prepare and furnish such statement to the officer delivering such offender to the intermediate reformatory. The section does not make it optional with the prosecuting attorney to furnish such statement by providing that he may do so but specifically directs that it shall be his duty to furnish such statement. The directive seems so clearly expressed as to leave no room for misunderstanding, and the directive must be complied with by the prosecuting attorney as a duty of his office.

From your letter it appears there may be some misunderstanding as to the administrative arrangement of the Board of Probation and Parole and the Intermediate Reformatory. These are separate administrative bodies and the information submitted to the Board of Probation and Parole is not relayed to the superintendent of the intermediate reformatory. The prosecuting attorney is not relieved of the duty imposed by section 217.170, R. S. Mo. 1949, by virtue of an investigation and reports having been filed with the Board of Probation and Parole.

Hon. James L. Paul,

The purpose of this section is to provide information relative to the inmate to the superintendent of the institution which may be useful in classifying and beginning a rehabilitation program for the inmate. The information required by this section is helpful and used for such a purpose; without it the institution is handicapped and the inmate's classification and rehabilitation program delayed. The mandate of the Legislature is too clearly expressed to give rise to a misunderstanding that the section may be disregarded and not complied with by the prosecuting attorney.

CONCLUSION.

It shall be the duty of the prosecuting attorney in the respective counties and the circuit attorney in the city of St. Louis to prepare and furnish a statement to the officer delivering a prisoner to the intermediate reformatory containing the information as outlined by section 217.170, RSMo 1949.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General.

JEM/ld

SENATE: When Senator-elect has been seated by State
LEGISLATURE:
ELECTIONS: Senate, he is entitled to salary of such
COMPTROLLER:
COMPENSATION: office.

January 11, 1951

1-12-51



Mr. Elmer L. Pigg
State Comptroller and
Director of the Budget
Department of Revenue
State of Missouri
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department reading as follows:

"On December 12, 1950 I received a notice from Senator Milton F. Napier, advising me that he is contesting the election of Senator David A. Hess of the Second Senatorial District of Missouri.

"I would like to have your official opinion as to whether I should certify for payment the salary of Senator Hess or should it be held up pending the final decision, since the Senate has seated Senator Hess.

"I am enclosing the notice of contest which I have received from Senator Napier."

The notice of contest which you enclosed with your letter is one signed and sworn to by Milton F. Napier, as contestant, and was filed in the Senate of the 66th General Assembly of the State of Missouri.

Section 33.180, Revised Statutes of Missouri, 1949, provides as follows:

Mr. Elmer L. Pigg

January 11, 1951

"Whenever any office, elective or appointive, the emoluments of which are required to be paid out of the state treasury, shall be contested or disputed by two or more persons claiming the right thereto, or by information in the nature of a quo warranto, then no claim shall be certified by the comptroller, nor any warrant signed by the auditor or paid by the treasurer, for the salary by law attached to said office, until the right to the same shall be legally determined between the persons or parties claiming such right; provided, however, that in all cases when the person to whom the commission for such office shall have been issued shall deliver to the party contesting his right to such office a good and sufficient bond in double the amount of the annual salary of such office, conditioned that if, upon final determination of the rights of the contestants, it shall be decided that the obligor is not, and the obligee therein is, entitled to the office in controversy, he shall pay over to the obligee the amount of salary therefor drawn by him as such officer, together with ten per cent interest thereon from the date of the receipt of each installment received by him, then, and in such case, notwithstanding the provisions of this law, a claim may be certified by the comptroller and a warrant may be signed by the auditor and paid by the treasurer, to the person holding the commission aforesaid, for the amount of his salary, as the same shall become due. It shall be the duty of any person contesting the election of any such officer to give notice of such contest to the comptroller and no such contest shall be heard or determined until he shall satisfy the tribunal trying

Mr. Elmer L. Pigg

January 11, 1951

such contest that such notice has been given."

Section 18, Article III of the Constitution of Missouri, provides in part as follows:

"Each house shall appoint its own officers; shall be sole judge of the qualifications, election and returns of its own members; * * * "

Section 5 of Article I of the Constitution of the United States provides in part as follows:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, * * * "

The Supreme Court of the United States, in discussing that part of Section 5 of Article I of the Constitution of the United States, quoted supra, said in the case of Barry vs. U. S. ex rel. Cunningham, 49 S. Ct. 452, 73 L. Ed. 867, 279 U. S. 597, 1.c. 614:

"It is said, however, that the power conferred upon the Senate is to judge of the elections, returns and qualifications of its 'members,' and, since the Senate had refused to admit Vare to a seat in the Senate or permit him to take the oath of office, that he was not a member. It is enough to say of this, that upon the face of the returns he had been elected and had received a certificate from the Governor of the state to that effect. Upon these returns and with this certificate, he presented himself to the Senate, claiming all the rights of membership. Thereby, the jurisdiction of the Senate to determine the rightfulness of the claim was invoked and its power to adjudicate such right immediately attached by virtue of Sec. 5 of Article I of the Constitution. Whether, pending this adjudication, the credentials should

January 11, 1951

be accepted, the oath administered, and the full right accorded to participate in the business of the Senate, was a matter within the discretion of the Senate. This has been the practical construction of the power by both Houses of Congress; and we perceive no reason why we should reach a different conclusion."

It is to be noted that the provisions of the State and Federal Constitutions are substantially identical with regard to the power of each house of the General Assembly to determine the question of who shall be seated in each house. Therefore, we believe the ruling in the Cunningham case, quoted supra, to be applicable under the provisions of Section 18 of Article III of the Constitution of Missouri.

It follows, therefore, that when the contestee was seated by the Missouri Senate he thereby became a de jure member of such body and will continue to remain a de jure member of such body until and unless he is removed by the action of the Senate. It follows, therefore, that he is entitled as a de jure member of the Senate to the emoluments of such office.

It is clear that the provisions of Section 33.180, quoted supra, apply only to contests where the successful person in the contest is entitled to the emoluments of the office, and when it cannot be determined whether the contestant or contestee is entitled to the emoluments of the office until the contest has been decided. The fact that a provision is found in such section for the posting of bond conclusively demonstrates this fact.

Since the contestee in this case is a de jure member of the Senate and is entitled to the emoluments of such office until and unless he is removed by the Senate, Section 33.180 can have no application to such person. If it were held that Section 33.180 were applicable to a State Senator it would, of course, be unconstitutional to that extent since the provision of Section 18 of Article III of the Constitution, quoted supra, vests solely in the Senate the power to determine its own membership, and Section 33.180, if applicable to State Senators, would prohibit a de jure Senator from being paid the emoluments of his office and would thereby violate such constitutional provision.

Mr. Elmer L. Pigg

January 11, 1951


CONCLUSION

It is the opinion of this department that when a person has been sworn in as a member of the Senate, he is entitled to the emoluments of his office until he is unseated, even though a contest is pending on the question of whether or not he shall retain his seat.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General of Missouri

CBB:lrt

CONSTITUTIONAL LAW:
MEDIATION, BOARD OF:
COMPTROLLER:
ATTORNEY GENERAL:

When Attorney General holds an act
unconstitutional, the salary and
expenses of officers acting thereunder
should not be paid after the date the
opinion is issued.

April 3, 1951

4-4-51

Honorable Elmer L. Pigg
Comptroller and Budget Director
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your request for an
official opinion, which reads as follows:

"Your opinion issued March 19th holding
the King-Thompson law void, raises a
question for this office.

"The payroll and expense accounts of the
State Board of Mediation for the month
of March have been filed for payment.
In view of your opinion, can I now legally
approve these accounts for payment? I
would like to have your official opinion
on this question as soon as possible."

As stated in your request, this department, on March 19,
1951, rendered an opinion to the Members of the House of
Representatives of the 66th General Assembly of Missouri, the
holding of which opinion was that the so-called King-Thompson
Act is in conflict with federal legislation enacted under the
Commerce Clause of the Constitution of the United States, and
that the King-Thompson Act is therefore unconstitutional. A
copy of this opinion was immediately given to you for your
information and guidance, and a copy was sent to the Chairman
of the State Board of Mediation.

As a part of the King-Thompson Act (Chapter 295, Sections
295.010 to 295.210, inclusive, R.S. Mo. 1949), Section 295.030
provides that the Governor shall appoint five persons to serve
as a State Board of Mediation. Section 295.050 of the act pro-
vides for a chairman of the board, one of whose duties it is
to supervise the work of the employees of the board. Section
295.060 states that the chairman shall receive a salary of five

Honorable Elmer L. Pigg

thousand dollars per annum, payable monthly; that each of the other members of the board shall receive fifteen dollars per day for the time spent in the performance of their duties; and that all members shall receive traveling and other expenses incurred in the performance of their duties.

Thus we have the problem wherein there is a state board operating under a statute which the Attorney General has declared to be unconstitutional. At the outset, we believe it is necessary to determine the effect of a ruling by the Attorney General that a statute is unconstitutional and the weight to be given the opinion by state officers.

The Attorney General in this state is a constitutional officer and he not only possesses the powers and duties as may be prescribed by the Legislature but he also is invested with all the powers and duties pertaining to the office at common law. (State ex rel. McKittrick v. Missouri Public Service Comm., 352 Mo. 29, 175 S.W. (2d) 857.) One of the duties of the Attorney General at common law was that duty to render advisory opinions to public officers. (5 Am. Jur. 243; 7 C.J.S. 1224.)

Section 27.040, R.S. Mo. 1949, relating to the duties of the Attorney General, reads as follows:

"When required, he shall give his opinion, in writing, without fee to the general assembly, or to either house, and to the governor, secretary of state, auditor, treasurer, commissioner of education, grain warehouse commissioner, superintendent of insurance, the state finance commissioner, and the head of any state department, or any circuit or prosecuting attorney upon any question of law relative to their respective offices or the discharge of their duties."

In the case of State ex rel. S.S. Kresge Co. v. Howard, 357 Mo. 302, 208 S.W. (2d) 247, the Supreme Court of Missouri, en Banc, discussed the responsibility of the Comptroller when he had been advised by the Attorney General that a law was unconstitutional. Judge Douglas, in speaking for the court, said at l.c. 249:

"Ordinarily a public officer may not question the constitutionality of a statute as a defense to mandamus to compel him to

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perform a ministerial duty. State ex rel. Thompson v. Jones, 328 Mo. 267, 41 S.W. (2d) 393. But in this case such defense is a proper one. Sec. 11008.46, Mo. R.S. A., provides that if the comptroller shall knowingly certify a claim not authorized by law he may be deemed guilty of a felony. Upon the Attorney General's advice that the claim was unauthorized, the comptroller was justified in taking the position he has in refusing to certify it."

Our Supreme Court, en Banc, in the case of State ex rel. Wiles v. Williams, 232 Mo. 56, 133 S.W. 1, laid down the rule that public officers must follow an opinion of the Attorney General that a law is unconstitutional. The court said, l.c. 71:

" * * * In this State we have the Attorney-General and the prosecuting attorneys of the various counties, whose duty it is to give legal advice to other officers of the State and counties when called upon for advice regarding the administration of the affairs of their respective offices. (Secs. 4941, 4950 and 4951, R.S. 1899.) In the case at bar, it appears from the record that the Attorney-General of the State was called upon and gave a written opinion to the county court of Nodaway county, which was the fiscal agent thereof, to the effect that the act in question was unconstitutional, null and void, and that said court informed relator of said opinion, and notified him not to pay the warrant mentioned in the pleadings; and that if he did so, he would be held liable upon his bond for the amount so paid thereon. In the light of those disclosures, the respondent not only had the legal right to raise the constitutionality of the act, but under those facts it became his legal duty to do so, otherwise he would have paid the warrant at his peril."
(Emphasis ours.)

In the case of State ex rel. Johnson v. Baker, 74 N. Dak. 244, 24 N.W. (2d) 355, the Supreme Court of North Dakota discussed the status of an opinion of the Attorney General under

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a constitutional provision and a statute practically identical with those in Missouri. The court said at N.W. (2d) 1.c. 364:

" * * * Thus the attorney general is made the legal adviser of both the legislative assembly and the state officers and it is particularly to be noted that he shall give written opinions to the legislative assembly upon legal questions and shall consult with and advise the governor and all other state officers and, when requested, give opinions not only on all legal questions but also on all constitutional questions relating to the duties of such officers. And the opinions so written must be recorded in a book which must be delivered to his successors in office. Reading this statute we can reach no other conclusion than that the legislature, thus imposing these duties upon the attorney general, made him the chief law officer of the state - the responsible legal adviser for the state auditor as well as for the other state officers, whose opinions shall guide these officers until superseded by judicial decision; that it took note of the fact that these officers are not required to be learned in the law and contemplated that when any constitutional or other legal question arises regarding the performance of an official act their duty is to consult with the attorney general and be guided by the opinion that officer, if requested to do so, must give them. If they follow this course they will perform their duty, and even though the opinion thus given them be later held to be erroneous, they will be protected by it. If they do not follow this course, they will be derelict to their duty and act at their peril."

In view of the above it will be seen that the opinion of the Attorney General that the King-Thompson Act is unconstitutional imposes upon the Comptroller, the members of the State Board of Mediation, and all other officers affected thereby, the legal duty to follow and conform to such opinion, and failure to do so would make such officers derelict in their duty and they would be acting at their peril.

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The questions arise whether or not public officers and employees are entitled to any compensation for services rendered under an unconstitutional act, and whether or not the state is liable for supplies sold to a department created by an unconstitutional act.

The rule in this state is that an unconstitutional statute is "to be regarded as void ab initio, and as though it had never been in existence." (Lieber v. Heil, 32 S.W. (2d) 792.) However, it has been held by the courts of this state that a person who is exercising the duties of an office under an unconstitutional law before said law is declared to be unconstitutional is a de facto officer. In the case of Redman v. St. Joseph Hay & Grain Co., 209 Mo. App. 682, 239 S.W. 540, the court said, l.c. 543:

" * * * The general rule is that there cannot be such a thing as a de facto incumbent of an office that does not exist. * * * The only general exception to this rule that we have been able to find is stated in State v. Carroll, 38 Conn. 449, 472, 9 Am. Rep. 409, where the court, in enumerating instances where a person becomes a de facto officer, states that he is such where he exercises the duties of the office 'under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such.' * * *"

The question of compensation of public officers or employees for services rendered under an unconstitutional act is reviewed in 101 American Law Reports 1417. The cases of most jurisdictions hold that an officer appointed or elected under an unconstitutional statute is a de facto officer and as such is not entitled to any compensation. (Meagher v. Storey County, 5 Nev. 244; Nagel v. Bosworth, 148 Ky. 807, 147 S.W. 940; Maud v. Terrell, 109 Tex. 97, 200 S.W. 375; Morris v. People, 3 Denio (N.Y.) 381.) However, this view is contrary to the position taken by the courts of this state.

In the recent case of Gershon v. Kansas City, 215 S.W. (2d) 771, the Kansas City Court of Appeals had occasion to review the law in Missouri relating to the right of a de facto officer to compensation. The court, in conclusion, said at l.c. 775:

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"It is our opinion that the rule, therefore, in this state is, in effect, that one who is accepted and assigned to an office or position in a municipality, and, in good faith, and under color of right, takes and holds possession of said office and discharges the duties thereof, relying upon the prescribed salary therefor, may sue the municipality and recover any such compensation not paid. Especially would this rule apply in the instant case where no one else disputed the right, title or possession of claimant's office."

The Gershon case, above, points out that the holding of the office and the discharging of duties thereof must be in good faith. In this regard we call your attention to the case of Cosgrove v. Perkins, 139 Mo. 106, 40 S.W. 650. While that case dealt with the rights of third persons in their relations with a de facto officer, still we believe what was said is equally true as to the de facto officers themselves. The court, through Judge Sherwood, said:

"The foundation stone of this whole doctrine of a de facto officer, as gathered from all the authorities, seems to be that of preventing the public or third persons from being deceived to their hurt by relying in good faith upon the genuineness and validity of acts done by a pseudo officer. However much color of authority may clothe the person who assumes to perform the function of an office and discharge its duties, yet, if the public or third persons are not deceived thereby, - if they know the true state of the case, - the reason which gives origin or existence to the rule which validates the act of an officer de facto ceases; and with it cease, also, all of its ordinary validating incidents and consequences."

In the case of Alleger v. School District of Newton County, 142 S.W. (2d) 660, the Springfield Court of Appeals held that a teacher who was employed by a de facto board of directors of a school district could not recover her salary because she knew

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at the time the contract was entered into that one of the directors did not possess the qualifications to authorize him to serve as a director, and that therefore she was lacking in good faith.

In the instant case there is no doubt that the Legislature enacted a statute providing for a State Board of Mediation and that the Governor, under authority of that statute, appointed members to such Board. The members of the State Board of Mediation, under color of authority of the statute and of the appointment, have in good faith held their offices and discharged the duties thereof. Until March 19, 1951, neither the members of the State Board of Mediation nor you had ever been advised either by this department or by a court that the King-Thompson Act was unconstitutional. On that date you, as Comptroller, and the members of the State Board of Mediation were notified that the law under which the Board was operating was unconstitutional. After you and the Board were advised by this office that the law was unconstitutional it became your duty to follow the opinion, and it was further your duty to refuse to approve for payment any salaries and expenses incurred by the Board after the date of the opinion.

Therefore, it would appear that under the ruling in the Gershon case, above, the members of the Board would be entitled to their compensation until the date when this office ruled that the King-Thompson Act was unconstitutional. What is said in regard to the salary of the members of the Board of Mediation is equally applicable to the employees of such Board and to the debts and obligations that the Board has contracted in good faith.

CONCLUSION

It is therefore the opinion of this department that the State Comptroller may legally approve for payment the payroll and expense accounts of the State Board of Mediation which accrued or were incurred prior to the rendition of the opinion of this department on March 19, 1951, holding the King-Thompson Act unconstitutional, but the Comptroller should not approve for payment the payroll and expense accounts of the State Board of Mediation which have accrued or were incurred after the opinion was given.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JOHN R. BATY
Assistant Attorney General

SCHOOLS: Oral promise made by two of three member school board to pay bonus to teachers invalid and unenforceable.

May 7, 1951

FILED

71

5-10-51

Honorable W. H. Pinnell
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department, which, in part, reads:

"I would like your opinion on the following matter:

"Where two members of a three member board in a rural school district, after the start of the school year and after the contract of employment has been signed, orally promise to pay a teacher or teachers a \$200.00 bonus based upon the type of certificate held by the teacher, but where a third member of the board did not concur in this action nor was there any record in the minutes of the school board nor was this promise included in the teacher's contract, is there legal grounds for so paying this sum as bonus and if it were so paid, would the present school directors be legally liable for a misappropriation of public funds?"

Pursuant to a request for additional information, your letter of April 24 was received which states the following facts:

"It is my understanding that there was no official meeting of the Board of Directors when the bonus arrangement was made. It is my further understanding

Honorable W. H. Pinnell

that the promise was made after the start of the school year and was made outside of a regular board meeting and in private conversation with the teacher by two members of the three member board."

Regarding the matter of transacting business by the board of directors of a common school district, Section 165.213, R.S. Mo. 1949, provides as follows:

"The directors shall meet within four days after the annual meeting, at some place within the district, and organize by electing one of their number president; and the board shall, on or before the fifteenth day of July, select a clerk, who shall enter upon his duties on the fifteenth day of July, but no compensation shall be allowed such clerk until all reports required by law and by the board have been duly made and filed. A majority of the board shall constitute a quorum for the transaction of business; provided, each member shall have due notice of the time, place and purpose of such meeting; and in case of the absence of the clerk, one of the directors may act temporarily in his place. The clerk shall keep a correct record of the proceedings of all the meetings of the board. No member of the board shall receive any compensation for performing the duties of a director."

The above section has been construed to mean that for transacting any business by the board of directors for and in behalf of the school district, the same has to be accomplished through a legally constituted meeting of said board.

In Johnson v. School District, 67 Mo. 319, the court, in considering the legality of a contract for the purchase of certain school supplies, said at l.c. 321:

"It is clear that the members of the board in transacting business for the district were to do so in meetings of the board. In purchasing maps and

Honorable W. H. Pinnell

globes, they could only act when assembled together in a meeting as the board of directors, and neither two nor all of the directors acting separately and apart from each other, could bind the district by any contract they might make. * * *

Again, in the case of State v. Lawrence, 178 Mo. 350, the court was construing Section 9761, R.S. Mo. 1899, which was substantially the same as the above-quoted section of the 1949 Revised Statutes. After quoting the section, the court said at l.c. 373, 374:

"It will thus be seen that the officials of the school district - a body corporate - must conduct the business of the district in an official way, as indicated by the statute.

"To have issued a school warrant, binding upon the district mentioned in this cause, for the purchase of the books sought to be purchased by it, the directors in such transaction would be required to meet as a board, with one of their number as clerk, who is required to keep a correct record of the business of such meeting; then, as a body, make the purchase, order the warrant drawn in conformity to the requirements of the statutes, all of which must be evidenced by the record of the meeting."

Regarding the employment of teachers by the board of directors of a school district, Section 163.080, R.S. Mo. 1949, provides:

"The board shall have power, at a regular or special meeting called after the annual school meeting, to contract with and employ legally qualified teachers for and in the name of the district; all special meetings shall be called by the president and each member notified of the time, place and purpose of the meeting. The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages

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per month to be paid; shall be signed by the teacher and the president of the board, and attested by the clerk of the district when the teacher's certificate is filed with said clerk, who shall return the certificate to the teacher at the expiration of the term. The certificate must be in force for the full time for which the contract is made. The board shall not employ one of its members as a teacher; nor shall any person be employed as a teacher who is related within the fourth degree to any board member, either by consanguinity or affinity, where the vote of such board member is necessary to the selection of such person; nor shall the teacher serve as a clerk of the district. All transactions of the board under this section must be recorded by and filed with the district clerk; provided, that the board of education of any first-class high school may employ a superintendent either before or after the annual school election."

The above section is clear in its meaning in providing a particular procedure to be followed when contracting with a teacher for employment.


From the facts which you have related it definitely does not appear that the statutory requirements were complied with when two members of the school board in question orally promised to pay the bonus to a certain teacher or teachers.

CONCLUSION

It is therefore the opinion of this department that an oral promise made by two members of a school board of a common school district, and not at a regular school board meeting, to pay a bonus to a teacher or teachers is invalid, and there would be no legal basis for paying said bonus.

Respectfully submitted,

APPROVED:


J. E. TAYLOR
Attorney General

RICHARD F. THOMPSON
Assistant Attorney General

RFT:ml

CRIMINAL COSTS: City of St. Louis entitled to be reimbursed by
the state the actual cost for board of prisoners
MUNICIPALITY: in the city jail pending trial for certain
offenses.

June 16, 1951

Honorable E. L. Pigg
Comptroller
Department of Revenue
Jefferson City, Missouri



6-16-51

Dear Sir:

Under date of December 22, 1950, this department rendered an opinion to you relative to criminal costs wherein we held, among other things, that there was no liability of the state to reimburse the City of St. Louis for board of persons held in the city jail of St. Louis, Missouri, pending trial, as there was no statute providing for such liability.

Certain statutory provisions have been called to the attention of this department since rendering that opinion and in view of same, we have reconsidered the foregoing opinion as rendered and have concluded that insofar as the foregoing opinion relates to the reimbursement by the state to the City of St. Louis for such costs, it should be withdrawn and this be the controlling opinion as to that particular portion of the opinion.

Prior to the enactment of Senate Bill No. 1071 by the 65th General Assembly, now known and referred to as Section 221.100, RSMo 1949, the specific statutes that were repealed by that bill did specify the amount allowed for such expenses and that the State of Missouri should reimburse the City of St. Louis for same. However, the law enacted in lieu of the former one did not mention the City of St. Louis, but only certain counties. So, at first blush, it would appear in view of certain well established rules of statutory construction that by repeal of an act for reimbursement to said City and failure to enact legislation for reimbursement to said City for such costs, but by enacting legislation for reimbursement of costs to certain counties only, that the legislative intent was to provide for reimbursement to counties only and not to the City of St. Louis. One of the well known canons of statutory construction is that the expression of one thing is the exclusion of another. State ex rel. Kansas City Power and Light Co. v. Smith, 111 S.W. (2d) 513, 342 Mo. 75. Also, under the rule of strict construction requiring taxing statutes to be strictly construed, which include such costs as herein referred to, the intent of the Legislature was not to provide for any such reimbursement to the City of St. Louis for such costs.

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While it is true Section 221.100, supra, does not mention the City of St. Louis as being entitled to reimbursement for any particular amount, there are other statutes dealing directly with the matter that do specify under what conditions the City shall be reimbursed for such costs.

Section 221.110, RSMo 1949, provides:

"It shall be the duty of the municipal assembly of any city not in any county in this state on the first day of November of each and every year to fix the amount of the fee for furnishing each prisoner with board for each day for one year, commencing on the first day of January next thereafter."

Section 221.160, RSMo 1949, provides:

"The expenses of imprisonment of any criminal prisoner, such as accrue before conviction, shall be paid in the same manner as other costs of prosecution are directed to be paid; and those which accrue after conviction shall be paid as is directed by the law regulating criminal proceedings."

Section 550.010, RSMo 1949, provides:

"Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county."

Section 550.020, RSMo 1949, provides in part:

"1. In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen

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years, the state shall pay the costs, if the defendant shall be unable to pay them, except, costs incurred on behalf of defendant."

Section 550.040, RSMo 1949, provides:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

It certainly cannot be argued that the foregoing provisions providing that said City is entitled to said reimbursement by the state for board of prisoners in the city jail pending trial for certain offenses should be ignored, or that such provision shall have no force and effect in determining this question. The Legislature, in repealing or enacting new legislation, under the rules of statutory construction, is presumed to know all the laws in full force and effect at the time of such enactment. See *Smith v. Pettis County*, 136 S.W. (2d) 282, 345 Mo. 839; *Howlett v. Social Security Commission*, 149 S.W. (2d) 806, 347 Mo. 784. So, we must hold in view of this rule of construction that the Legislature knew of the law in effect at the time it enacted Section 221.100, supra, and that the legislative intent was for the state to reimburse the City of St. Louis as provided in the foregoing statutes that were not disturbed by the 65th General Assembly.

It is our understanding that the City of St. Louis has passed an ordinance in conformity with Section 221.110, supra. So, in view of this and also the foregoing conclusion, that the legislative intent was for the state to reimburse the City of St. Louis as provided in the foregoing statutes which were not amended or repealed by the 65th General Assembly, we are of the opinion the City of St. Louis should be reimbursed for the amount of board fixed by the ordinance passed by virtue of

Honorable E. L. Pigg

Section 221.110, supra, for board to prisoners in the city jail pending trial for those offenses mentioned in the foregoing statutes for which the state is liable.

CONCLUSION

It is the opinion of this department that the City of St. Louis is entitled to reimbursement in an amount fixed by ordinance of the City of St. Louis passed by virtue of Section 221.110, supra, as costs for board to prisoners in the city jail pending trial for only those offenses mentioned in Sections 221.160, 550.010, 550.020, 550.040, RSMo 1949, and for which the state is liable.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARR:VLM

SOCIAL SECURITY:
STATE AGENCY:

The state agency has no authority under Senate Bill No. 3 to exclude from coverage services of an emergency nature.

July 5, 1951

7-6-51



Honorable Elmer L. Pigg
State Comptroller and Director
of the Budget
Department of Revenue
Capitol Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your recent request for an opinion from this department which request reads as follows:

"Senate Committee Substitute for Senate Bill No. 3 designates the Division of Budget and Comptroller as the State Agency to administer the Act.

"Do I have the authority under this Act to exclude services of emergency nature, as permitted by Federal law? If so, do I have the authority to determine what service is of an emergency nature?"

Your question requires an interpretation of Senate Committee Substitute for Senate Bill No. 3 as recently passed by the 66th General Assembly and approved May 31, 1951.

Prior to the 1950 amendments of the Federal Social Security Act, state and local government employees were exempt from coverage under the old-age and survivors insurance provisions of the act. The 1950 amendments makes possible for the first time the coverage of state and local government employees. This coverage is not compulsory but is placed upon a voluntary basis. Specifically

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enabling legislation is necessary on behalf of the state to cover state and local employees. Senate Bill No. 3 authorized this coverage. It is noted particularly that Senate Bill No. 3 only allows state and local government employees to come under the provisions of the Federal Social Security Act. Therefore any interpretation of Senate Bill No. 3 must of necessity include reference to the Federal Act.

Section 218(c), as amended, of the Federal Social Security Act provides in part as follows:

"(1) An agreement under this section shall be applicable to any one or more coverage groups designated by the State.

"(2) In the case of each coverage group to which the agreement applies, the agreement must include all services (other than services excluded by or pursuant to subsection (d) or paragraph (3), (5), or (6) of this subsection) performed by individuals as members of such group."

Paragraph (2) of Subsection (c) of Section 218, as amended, provides that all services in each coverage group shall be included in the agreement entered into between the state and the Federal Security Administrator, with the exceptions noted.

Paragraph (3) of Section 218(c), as amended, provides as follows:

"Such agreement shall, if the State requests it, exclude (in the case of any coverage group) any services of an emergency nature or all services in any class or classes of elective positions, part-time positions, or positions the compensation for which is on a fee basis."

From the above quoted paragraph it is quite obvious that the state could have excluded within any coverage group any services of an emergency nature. We believe that if such services were to be excluded, to fully comply with said provision, they should have been expressly set forth. Looking now to Senate Committee Substitute for Senate Bill No. 3, we find no express exclusions. In fact, we are led to the opposite conclusion, i.e., that all services of

Honorable Elmer L. Pigg

whatever nature were intended to be covered by the provisions of this act.

Paragraph 3 of Section 2 provides:

"All services which constitute employment as defined in section 1 and are performed in the employ of the state by employees of the state shall be covered by the agreement."

(Underscoring ours.)

Paragraph 4 provides:

"All services shall be covered by the agreement which:

- (1) Constitute employment as defined in section 1;
- (2) Are performed in the employ of a political subdivision or in the employ of an instrumentality of either the state or a political subdivision;* * *."

This section provides that all services shall be covered which constitute employment as defined in Section 1. The term employment as defined in Section 1, Subsection 3 is as follows:

"'Employment', any service performed by any employee of the state or any of its political subdivisions or any instrumentality of either of them, which may be covered, under applicable federal law, in the agreement between the state and the federal security administrator, except services, which in the absence of an agreement entered into under this act would constitute 'employment' as defined in section 210 of the Social Security Act."

(Underscoring ours.)

Since this definition includes any service which may be covered under applicable law in the agreement between the state and the Federal Social Security Act, and since services of an emergency nature could be included, we are of the opinion that the state agency has no authority to exclude services of an emergency nature.

Honorable Elmer L. Pigg

Having concluded that the state agency has no such authority under Senate Bill No. 3, there is no need to pass upon your second question.

CONCLUSION

Therefore, it is the opinion of this department, that since services of an emergency nature could be covered in an agreement entered into between the state and the Federal Social Security Act, and since we can find no express exclusion of such service under the terms of Senate Bill No. 3, which could have been done under applicable law, the state agency does not have the authority to exclude from coverage services of an emergency nature. Further, we are of the opinion that such service must be included in the agreement entered into with the Federal Security Administrator.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

SALES TAX: It is not necessary for public schools supported
TAXATION: solely by public funds to charge a sales tax to
persons purchasing tickets of admission to school
sponsored athletic events, plays and entertainments.

September 10, 1951

9-10-51

Mr. W. H. Pinnell
Prosecuting Attorney
Berry County
Cassville, Missouri



Dear Sir:

This department is in receipt of your recent request
for an official opinion. You thus state your opinion request:

"I have been requested by a school system
within this County to request your opinion,

"as to whether or not it is necessary
for schools to charge state sales tax to
patrons attending athletic contests,
school plays, or any other form of enter-
tainment in which an admission is charged."

We assume from your letter that the schools to which you
refer are public schools supported and maintained solely by
public funds.

Section 144.040, RSMo 1949, states:

"In addition to the exemptions under sec-
tion 144.030 there shall also be exempted
from the provisions of this chapter all
sales made by or to religious, charitable,
eleemosynary institutions, penal institu-
tions and industries operated by the
department of penal institutions or edu-
cational institutions supported by public
funds or by religious organizations, in the
conduct of the regular religious, charitable,
eleemosynary, penal or educational functions
and activities, and all sales made by or to a
state relief agency in the exercise of relief
functions and activities."

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You will note that the above section exempts from the operation of the sales tax law "educational institutions supported by public funds or by religious organizations ... in the conduct of the regular ... educational functions and activities ..."

From the above it would clearly appear that public schools supported by public funds are not subject to the sales tax law in the conduct of their educational functions and activities.

It would appear that the only question which we now have to answer is whether school sponsored athletic events, school plays and entertainments, are "educational functions and activities."

In considering this matter we would first call attention to the policy of our courts to liberally construe exemption statutes in favor of educational institutions. In the case of *State ex rel. v. Trustees of William Jewell College*, 234 Mo. 299, the court said, l.c. 308:

"It is urged that exemption statutes are to be strictly construed. Generally speaking, such is the rule. But we take it from the cases that there has been a well recognized exception to the rule. Perhaps a better wording would be to say that the courts have never been over anxious to apply the rule so as to impose burdens upon religious, scientific, literary and educational institutions. Strict construction has largely been applied to corporations organized for profit and gain, not to corporations performing a public service.
* * *

In the case of *Alexander v. Phillips*, 254 Pac. 1056, the question before the court was whether a school district could issue bonds for the building of a stadium in which athletic events and contests would be held. The court held that the school district could do this; that athletic contests were properly part of the educational program. In summation, the court said, l.c. 1059:

"For the foregoing reasons, we are of the opinion (1) that physical education is one of the branches of knowledge legally imparted in the Phoenix union

Mr. W. H. Pinnell

high school; (2) that competitive athletic games and sports in both intra and inter mural games are legal and laudable methods of imparting such knowledge; and (3) that a structure whose chief purpose is to provide for the better giving of such competitive athletic games and sports as aforesaid is reasonably a schoolhouse within the true spirit and meaning of paragraph 2736, supra."

In the case of Woodson et al. v. School District No. 28, Kingman County, et al. 274 Pac 728, the court had before it the question whether a common school district could erect and issue bonds in payment for a building to be used in part for classrooms, and in part for athletics and the teaching of dramatics. In its opinion the court said, l.c. 730:

"* * * But, even if the record disclosed that the sole purpose of the building was for the teaching of dramatics and athletics, we should be slow to hold that defendants would have no authority to proceed. We have been cited to no authority holding, and we would be reluctant ourselves to hold, that the study of dramatic expression, or that physical training, were not educational subjects. It is a matter of common knowledge, of which this court may take judicial notice, that such subjects are taught in practically all the high schools, colleges, and universities in this state."

In the case of Dodge v. Jefferson County Board of Education, 181 S.W. 2d 406, the question before the court was the propriety of an expenditure of tax funds collected for educational purposes, for maintenance of a recreational plan for children of school age. The court held that such an expenditure was embraced in the term "education."

In the case of Wysong v. Walden, 52 S.E. 2d 392, the court stated, l.c. 398:

"Specification No. 5 is to the effect that respondents, as a majority of the board, authorized the payment, among others, of a bill of Starr Sporting Goods Company,

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of Huntington, West Virginia, in the sum of \$294.00, and that an order for that amount, marked 'for athletic equipment', was subsequently issued to said company. The demurrer to this specification was properly sustained. Education is a broad term. It embraces the development of both mind and body. The purchase of athletic equipment to be used by the pupil in the schools of Lincoln County certainly is not, ipso facto, an abuse of discretion. A fortiori it is not necessarily a ground for removal of the officers making the contract."

Finally, we direct attention to the case of Bohemian Gymnastic Ass'n Sokol of City of New York v. Higgins, 147 F. 2d, 774, a decision by the United States Circuit Court of Appeals, Second Circuit. The court stated the issue as follows, l.c. 774:

"This is an appeal by the Collector of Internal Revenue from a judgment in favor of the plaintiff rendered after a trial before Judge Conger without a jury. He held that the plaintiff, Bohemian Gymnastic, was a corporation organized exclusively for educational purposes, no part of the net earnings of which accrued to the benefit of any shareholder or individual, hence was not liable to pay Social Security taxes with respect to the wages paid to its employees and was entitled to a refund of \$47.87 of those taxes which it had paid. In our opinion the decision was right and should be affirmed."

The court held that where educational programs of corporation consisted of gymnastic and athletic classes, contests, games and summer camping projects, musical and dramatic classes, recitals, folk and classical dancing, and art exhibits, and such program was supplemented by regular classroom lectures in first aid, hygiene, citizenship, civics, literary work, and national defense, such activities could properly be regarded as "educational" within exemption from social security taxes with respect to wages paid to employees.

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From the above cases it would appear that school sponsored athletic events, school plays and entertainments, are "educational functions and activities," and are therefore exempt from the operation of the sales tax law to the extent that the sales tax need not be added on to the price of admission to such functions and activities.

This department has so held in an opinion rendered January 21, 1948, to Honorable L. Madison Bywaters, Prosecuting Attorney at Clay County, a copy of which opinion is attached.


CONCLUSION.

It is the opinion of this department that it is not necessary for public schools, supported solely by public funds, to charge a sales tax to persons purchasing tickets of admission to school sponsored athletic contests, plays and entertainments.

Respectfully submitted.

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

HPWab

Enclosure.

SOCIAL SECURITY:
UNIVERSITY EMPLOYEES:

Employees of State Universities are employees of the State and the State Comptroller as state agency under SCSSB No. 3, is authorized to accept social security contributions from funds held by State Universities under provisions of Section 33.080, RSMo 1949, for university employees paid from those funds.

September 11, 1951

7-11-51

Honorable Elmer L. Pigg
Comptroller and Budget Director
Department of Revenue
State of Missouri
Jefferson City, Missouri



Dear Sir:

We are in receipt of your recent opinion request which reads as follows:

"The University of Missouri and Lincoln University receive grants from the federal government, which can and are used for the payment of salaries and expenses of the Universities. Other receipts come from students, which are used in like manner. The University of Missouri does not deposit any of these receipts in the State Treasury to be appropriated. Lincoln University and the state colleges deposit only a part of student fees in the State Treasury to be appropriated (R. S. Mo. 31.080). The money which these institutions retain remain under their control and disbursed by them for salaries and expenses. The only funds under control of State are appropriations made to these institutions. In order for these institutions to match the contributions of employees who are paid from the funds retained by these institutions is to pay into the Contribution Fund (Sec. 6, page 9, S. C. S. for S. B. No. 3) an equal amount from funds under their control. Payment is made to the 'State Treasurer of Missouri, Custodian of the Contributions Funds.' Disbursement is to be made from the Contributions Fund to the federal agency and for certain refunds and adjustments.

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"Do I have the legal authority to accept and deposit in the Contributions Fund the amounts withheld from employees and payment of the state's part, to match employees contributions, from funds under control of these institutions, and disburse them as provided in Sec. 6, page 9, S. C. S. for S. B. No. 3? I respectfully request your official opinion on this question."

The funds referred to in your letter which accrue to the Universities and are not deposited in the State Treasury and appropriated by the General Assembly to the Universities are held by the institutions under authority conferred by Section 33.080, RSMo 1949, which reads as follows:

"All fees, funds and moneys from whatsoever source received by any department board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the general assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the constitution of this state), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision thereof, shall be deemed guilty of a misdemeanor; provided that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; Appropriations, gifts or grants from the federal government, private organizations and individuals;

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funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the governor and biennially to the general assembly."

The institutions employ persons who are paid from funds retained by the institutions under the authorization of this section. Your question then is whether the custodian of the "Contributions Fund" has authority to accept and deposit in the contributions fund the amount withheld from employees' wages paid from these funds and whether you may accept payment of the employer's contribution (matching employees' contribution) from the funds under control of these institutions.

The state operates only through its agencies which are created by the constitution and state statutes. The Universities referred to are agencies of the state charged with the obligation of performing certain functions.

S.C.S. for S.B. No. 3, Section 1, paragraph (2), defines "employee" as follows:

"(2) 'Employee', elective or appointive officers and employees of the state, including members of the general assembly, and elective or appointive officers and employees of any political subdivision of the state, or any instrumentality of either the state or such political subdivision; provided, that employees who are members as of July 1, 1951, of any retirement system supported wholly or in part by the state or any of its instrumentalities or political subdivisions may not be included in an agreement.;"

Paragraph (3) defines employment as follows:

"(3) 'Employment', any service performed by any employee of the state or any of its political subdivisions or any instrumentality of either of them, which may be covered,

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under applicable federal law, in the agreement between the state and the federal security administrator, except services, which in the absence of an agreement entered into under this act would constitute 'employment' as defined in section 210 of the Social Security Act;"

Section 2, paragraph 1, of said Act provides as follows:

"The state agency, with the approval of the governor, shall enter into on behalf of the state an agreement with the Federal Security Administrator, consistent with this act, for the purpose of extending the benefits of the federal old-age and survivors insurance system to employees of the state or of any of its political subdivisions, or of any instrumentality of any one or more of them, with respect to services specified in such agreement, which constitute employment as defined in section 1 of this act. Such agreement may contain provisions relating to coverage, benefits, contributions, effective date, modifications and termination of the agreement, administration and other appropriate provisions, and except as otherwise required by the Social Security Act as to the services to be covered, such agreement shall provide that benefits will be granted to employees whose services are covered by the agreement, their dependents and survivors, on the same basis as though the services constituted employment within the meaning of Title 2 of the Social Security Act."

And paragraph 3 of the same section reads as follows:

"3. All services which constitute employment as defined in section 1 and are performed in the employ of the state by employees of the state shall be covered by the agreement."

Following the passage of this Act, the following resolution was adopted by the University Board which reads in part as follows;

"Commencing on the first day of the month following the date of the approval of the plan and agreement of this Board by the State

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Agency, there shall be paid out of any one or more of the various funds which are and may be under direct supervision and control of this Board and which are not appropriated by the General Assembly of the State of Missouri, the sum or sums of money necessary to pay the contributions of this Board, as employer, which shall be due and payable by virtue of the extension of the benefits of the Federal Old-Age and Survivors Insurance System to those eligible employees and officials of this Board whose wages are paid, in whole or in part, from monies not appropriated by the General Assembly of the State of Missouri, said sum or sums of money to be paid into the Contributions Fund, created by Senate Committee Substitute for Senate Bill No. 3 of the 66th General Assembly of the State of Missouri; provided, however, that in making the first payment to said Contributions Fund after the benefits of said system have been extended to such employees and officials, said first payment shall include a sum equal to the amount which would have been due and payable had said extension of benefits been provided and effective on January 1, 1951. The fund or funds from which said payments are to be made will at all times be sufficient to pay the contributions of this Board by this paragraph of this resolution directed to be paid to said Contributions Fund by virtue of the extension of said benefits to the eligible employees and officials of this Board in this paragraph referred to;"

A plan or agreement was then adopted which reads in part as follows:

"(3) The Board, upon approval of this plan and agreement by the State Agency, will pay into the Contributions Fund, created by the State Act, at such time or times as the State Agency shall prescribe, contributions with respect to wages in the amounts and at the rates specified in the agreement entered into between the State of Missouri and the Federal Security Administrator, such amounts, except as in this paragraph otherwise provided, to be

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equal to the sum of the taxes which would be imposed by Sections 1400 and 1410 of the Federal Insurance Contribution Act if the services covered by said agreement and by this plan and agreement constituted employment within the meaning of said Act, it being understood, however, that the portion of said contributions which is to be paid by the Board on its behalf, as employer, shall be paid only with respect to those of its eligible employees and officials whose wages are paid, in whole or in part from monies not appropriated by the General Assembly of the State of Missouri; provided, however, that in making the first payment to said Contributions Fund after the approval of this plan and agreement by the State Agency, said first payment shall include a sum equal to the amount which would have been due and payable had this plan and agreement, the agreement between the State of Missouri and the Federal Security Administrator, and the State Act, all been effective on January 1, 1951. If the Board fails to make any of the payments herein provided to be made at the time or times when due, each and every such delinquent payment shall bear interest at the rate of six (6) per cent per annum from the due date until paid, and the State Agency may recover any such amount or amounts as may be delinquent, in the manner provided in the State Act."

It is the opinion of this department that those persons who are employed by the Universities of this state should be regarded as employees of an agency of the state under Senate Committee Substitute for Senate Bill No. 3. Under the provisions of Section 33.080, RSMo 1949, supra, and the authority vested in the regents of our State Universities, it is the opinion of this department that they have authority to make such a contract with the state agency under Senate Committee Substitute for Senate Bill No. 3. Further, that pursuant to the resolution cited above or by virtue of the agreement entered into between the university and the custodian of the contribution fund, such custodian is authorized to accept a deposit into the contribution fund the amount withheld from employees' wages and the matching contribution to be paid by the employer.

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CONCLUSION

It is the opinion of this department that employees of the State Universities who are paid wages from funds held and disbursed by the Universities under authorization of Section 33.080, RSMo 1949, are employees of the State, and for the purpose of administering Senate Committee Substitute for Senate Bill No. 3, the custodian of the contributions fund created therein is authorized to accept and deposit in the contributions fund the amounts withheld from employees and contributions of the employer, and disburse said funds as provided in Section 6, Senate Committee Substitute for Senate Bill No. 3.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

J.E.T.
APPROVED:

J. E. TAYLOR
Attorney General

JWFab

**SOCIAL SECURITY:
OFFICIAL COURT
REPORTERS:**

A circuit court reporter is an employee of each of the counties comprising his circuit and in the event the county has accepted the social security law ~~they~~ *it* shall pay social security deductions upon the amount it pays the reporter.

October 10, 1951

Honorable Elmer L. Pigg
State Comptroller &
Director of the Budget
State of Missouri
Jefferson City, Missouri



Dear Mr. Pigg:

Reference is made to your recent request for an official opinion, which reads as follows:

"I am receiving inquiries from counties and court reporters in the judicial circuits in Missouri about Social Security coverage for reporters.

"As you perhaps know, a reporter serving a circuit is paid by each county upon a statement from the circuit judge as to that county's share. This payment is based upon the population of that particular county.

"My question is: 'Should the County which has elected to extend coverage to its employees withhold from the reporter's salary and report him along with other county officials and employees, even though all of the counties in the circuit may not have elected to extend Social Security to its employees and officials?'"

In a recent opinion rendered by this department, August 28, 1951, to Honorable H. K. Stumberg, Prosecuting Attorney of St. Charles County, it was stated that for the purpose of the social security law, an official court reporter of a judicial circuit comprised of three counties, is an employee of each county to the extent that such county contributes to his compensation. In that opinion to Mr. Stumberg, it was not stated whether or not the amount withheld would be different in the event one of the several counties had not

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adopted the provisions of the Federal Old Age and Survivors Benefit Act, since all three of the counties of the court reporter's circuit had accepted the provisions of Senate Bill No. 3. We believe that it sufficiently showed that the employer-employee relationship existed for the purposes of Senate Bill No. 3.

In the matter of Shamburger v. Commonwealth et al. 240 S.W. 2d 636, it has been ruled by the Kentucky Court of Appeals as follows, l.c. 637:

"The fundamental point, it seems to us, is the fact that contributions (or excise taxes) required by the law to be paid by both employers and employees, is a percentage of wages or compensation paid and received. 26 U.S.C.A. secs. 1400, 1410. Therefore, so far as liability for payment is concerned, the controlling point is the source of the compensation, i.e., who pays the salaries."

(Emphasis, ours.)

For the purpose of determining the "employer" under the Federal Old Age and Survivors Insurance Act, it is certainly of vital importance that consideration be given to the person or legal entity paying the salaries or wages from which the employee's contribution must be extracted, and to determine the person or entity required to make the payment of the so-called employer's share.

In regard to this matter, we are compelled to call attention to another recent decision in a somewhat similar legal situation. In the matter of Magruder v. Yellow Cab Co. of D. C., Inc., the employer-employee relationship was considered and in that case, at 141 Fed. 2d 324, the court said, l.c. 325:

"It is crystal clear that two essential conditions precedent must concur in order that a valid tax may be here levied; (1) There must exist a relationship of employer and employee; (2) wages must be paid by the employer to the employee. * * *"

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The above quoted case concerns an interpretation of the same revenue act as for the Federal Old Age and Survivors Insurance provisions of Title 2 of the Social Security Act which is 26 U.S.C.A., Secs. 1400, 1410.

You have asked in your request, "should the county which has elected to extend coverage to its employees, withhold from the reporter's salary and report him along with other county officials and other employees, even though all of the counties in the circuit may not have elected to extend social security to its employees and officials?"

Our answer, based upon the reasoning of the above two decisions, and the provisions of the Act, must be that a county which has elected to come within the provisions provided by Senate Committee Substitute for Senate Bill No. 3 by passing the required regulation and entering into the proper agreement, must provide for deductions from the salary of all of its employees and make matching contributions to the contribution fund as set out in the Senate Bill.

Of course, a county which has not accepted the act need not either withhold or make a contribution and by the same token we do not believe that a county should pay contributions toward the salary of a court reporter on an amount either greater or less than the amount the county pays toward his salary.

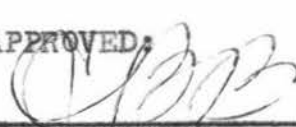
CONCLUSION

It is, therefore, the opinion of this department that for the purpose of coverage under the Social Security Act, a county which has accepted the provisions of Senate Committee Substitute for Senate Bill No. 3 must include the amount of compensation which it pays to the court reporter of the circuit court for the county, along with its other officers and employees even though all of the counties in the circuit for which the reporter acts have not elected to accept the provisions of the Senate Bill.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

JWFab

SOCIAL SECURITY:
OFFICIAL COURT
REPORTER:

The County Treasurer should deduct
social security contributions when
he pays the official court reporter.

November 20, 1951

11-21-51

Honorable W. H. Pinnell
Prosecuting Attorney of
Barry County
Cassville, Missouri



Dear Sir:

Reference is made to your recent request for an official
opinion of this department, which request reads as follows:

"The County Clerk asked that I write you
to determine who has the power and the duty
to withhold social security from the official
court reporter. There is one court reporter
for four counties in this circuit and she is
paid proportionate amounts by each of the
counties. Under the order of the County
Court of this county it is the duty of the
County Clerk to collect and make reports under
the social security program. However the
official court reporter is paid by the Cir-
cuit Clerk through a voucher and the voucher
is presented to the County Treasurer. What
we would like to know is whether the Circuit
Clerk, in the light of the County Court order
as to whom shall handle the social security
program, has power or the authority to withhold
the amount for social security or whether the
County Treasurer should deduct the amount for
social security when he honors and pays the
voucher."

In a recent opinion rendered by this department to the
Honorable Elmer L. Pigg, State Comptroller and Director of the

Honorable W. H. Pinnell

Budget, it was stated that a county which has accepted the provisions of Senate Committee Substitute For Senate Bill No. 3, must include the amount of compensation which it pays to the official court reporter along with all other officers and employees even though all of the counties in the circuit for which the reporter acts have not elected to accept the provisions of the Senate Bill.

The compensation of a court reporter is fixed by Section 485.060, RSMo 1949, which provides in part as follows:

"1. Court reporter shall receive salary as follows:

"(1) In judicial circuits which now have and such as may hereafter have a population of sixty thousand or more, an annual salary of three thousand five hundred dollars, payable in equal monthly installments out of the city or county treasury on the certification of the judge of the court in whose division such court reporter is employed; * * *."

(Underscoring ours.)

We assume that under the facts that you have presented, the circuit clerk acts for and on behalf of the circuit judge in presenting the voucher or certification to the county treasurer as required by this section. The administration of the plan and agreement submitted to the state agency is carried out by the proper county officials. The circuit judge would have no power or authority to make deductions under the social security program nor would the circuit clerk acting in his behalf.

Although Senate Bill No. 3, does not specifically state which official shall make the deductions required on county officials and employees, we are of the opinion that the county treasurer would be the proper authority to deduct the official court reporter's contributions imposed by Senate Bill No. 3, when he honors and pays the voucher.

CONCLUSION

Therefore it is the opinion of this department that the county treasurer would be the proper authority to deduct employees'


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contributions from the compensation of the official court reporter when he pays such reporter upon certification of the circuit judge.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

DDG:hr

JUDICIARY:
RETIREMENT COMPENSATION
OF JUDGES & COMMISSIONERS:

Retirement compensation of judges
and commissioners in accordance
with House Bill No. 118, should
be computed as one-third of salary
provided for by law at the present
time or at any future time.



November 27, 1951

Honorable Elmer L. Pigg
State Comptroller & Director of the Budget
State of Missouri
Jefferson City, Missouri

11-27-51

Dear Mr. Pigg:

You recently requested an opinion of this department,
which reads as follows:

"House Bill No. 118, which becomes effective on October 9, provides for retirement compensation for certain judges.

"I need your official opinion on the meaning of lines 16, 17, 18 and 19, section 1, page 2, which states:

"*** salary or retirement compensation during the remainder of his life a sum equal in amount to one-third the salary or compensation then or thereafter provided for by law ***".

"Does this mean the judge who applies for retirement is to receive one-third of his salary at the time he retired or one-third of the salary of that office now? Some judges who seek to retire received a much lower salary than that office pays today. On which amount should the computation be made?

"I shall appreciate your official opinion as soon as convenient."

We believe that in considering the quoted excerpt from Section 1 of House Bill No. 118, the interpretation would be that the person retiring would receive one-third of the salary provided for the office last held before he qualified at the date the payment of salary is made. If the salary of the

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office is increased, then the salary or compensation would be increased to one-third of the new salary provided for the office by law.

It is necessary, however, since the effective time of the "then or thereafter" must refer to time contained within the law, to quote Section 1 of House Bill No. 118 of the 66th General Assembly in its entirety. It is as follows:

"Any person having reached the age of 65 years and having in this state served an aggregate of 12 years, continuously or otherwise, as a judge or commissioner of the Supreme Court, or as a judge or commissioner of any of the Courts of Appeals, or as a circuit judge, or as a judge of a Court of Criminal Correction, or as a judge of a Court of Common Pleas, or either or both as judge or commissioner of any of said courts, and who shall have ceased to hold such office by reason of the expiration of his term, or voluntary resignation or retirement by reason of having reached the age of 75 years, under Section 25, Article 5, of the Constitution of Missouri, shall, if he so elects as hereinafter provided, be made, constituted and appointed a special commissioner or referee for and during the remainder of his life and shall, while he remains a resident of Missouri, be entitled to and shall receive as annual compensation, salary or retirement compensation during the remainder of his life a sum equal in amount to one-third the salary or compensation then or thereafter provided for by law for the office from which he has retired, and said sum shall be payable monthly out of the general revenue of the State of Missouri."

Considering the entire section quoted above, there are times contained therein to which the term "then or thereafter" could apply. The first reference to such time is as follows:

"Any person having reached the age of 65 years and having in this state served an aggregate of 12 years, * * * and who shall have ceased to hold such office * * *."

Honorable Elmer L. Pigg

This describes the first instance that "annual compensation, salary or retirement compensation" would be available to a person under the statute. There is the further retirement qualification that he shall have ceased to hold such office. This further modifies the qualifications for being appointed as commissioner.

The next reference contained in the section to the element of time is:

"* * * if he so elects as hereinafter provided, be made, constituted and appointed a special commissioner or referee for and during the remainder of his life and shall, * * *."

Continuing the same sentence, this reference to time above is further clarified by "while he remains a resident of Missouri." This is another reference to time. However, this last reference must certainly modify the preceding thought with a limitation of residence and becomes a part thereof.

We can consider, we believe, in getting at the meaning of this section that the Legislature did not designate in dollars and cents the amount to be paid to such commissioners upon or after their appointment. Instead, it took a proportion of the pay for the office, at the time of retirement, at the present, or in the future. The statute reads: "Then or thereafter provided for by law." As the salaries of the judges or commissioners affected by the Act vary not only by judicial rank but also by the population of the circuits and by the salary at the time such judge or commissioner served, this does not constitute a completely compelling argument for any of the possible legislative meanings. Section 1.090, RSMo 1949, reads as follows:

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

If the meaning of Section 1 of House Bill No. 118 should be considered ambiguous and the adverbs "then or thereafter" were to be considered without a definite time to which they would refer, the courts would, we believe, consider the results

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of the proposed interpretations. It was said in the case of Bragg City Special Road District v. Johnson, 208 S.W. (2d) 22, 323 Mo. 990, 1.c. 999:

"* * * It has been ruled by this court many times, that in the construction of statutes which are not clear in meaning, the results and consequences of any proposed interpretation of the statute may properly be considered as a guide as to the probable intent of the lawmaker, from the language used. (Kane v. Kansas City, Ft. Scott & M. Ry., 112 Mo. 34; State ex rel. v. Slover, 126 Mo. 652, 661.) * * *".

We feel, therefore, that we are at liberty to look into some of the consequences of this act. If we should interpret it to mean that the salary from which payments of one-third would be calculated was the salary referred to which was paid during any particular time of the service, then the act does not specify the month or year of service upon which the calculations would be based. If that was the intent of the Legislature, we believe it would have designated the year or month from which the proportion of one-third should be taken. In further interpretation, if "then" refers to the time of appointment, it is indeed questionable as to what the term "thereafter" would be deemed to refer. This law is enacted to apply from the time it becomes effective and thereafter as long as it remains on the statute books.

If the Legislature had intended commissioners to receive a proportion of the salary received during the last year of service we believe it would have been more easily said and certainly said more definitely.

This is a new position that has been created by the Legislature, the position of commissioner. It is created for a particular group. Definitely, it is for service that members of that group have rendered to the state. That service is also a requisite qualification necessary before the position of commissioner can be fulfilled. The term of this new office is for life. The Legislature no doubt took cognizance of the changes made in the salaries of judicial personnel even since the turn of the century. We believe that they meant to keep those salaries on an even proportion to the salary at the time payments of salaries or compensation are made to commissioners. We believe that it was the intent of the Legislature that this law

Honorable Elmer L. Pigg

should require payment out of the general revenue of the state, of one-third of the total salary that is provided by law for the office from which the newly constituted commissioner has retired. We believe that the phrase means the same with or without the word "total" as most certainly all of the salary is provided for by law.

CONCLUSION

It is, therefore, the opinion of this department that the meaning of lines 16, 17, 18 and 19 of Section 1, page 2 of House Bill No. 118, "*** salary or retirement compensation during the remainder of his life a sum equal in amount to one-third the salary or compensation then or thereafter provided for by law ***" is that the judge or commissioner, who applies for retirement is to receive one-third of the salary of the office he last held before he qualified. The computation would be made on the basis of one-third of the salary that is paid to that office, at the time of payment.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JWFab

VEHICLES: Amateur radio operators applying for license plates containing call letters need only pay
RADIO OPERATORS: \$1.00 fee and are not required to repay regular license fee.



December 20, 1951

12-20-51

Honorable Anthony D. Pickrell
House of Representatives
Sixty-Sixth General Assembly
State of Missouri
Capitol Building
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for an opinion which reads as follows:

"House Bill No. 242, enacted by the 66th General Assembly provides that licensed amateur radio operators may obtain license plates for their automobiles containing the call numbers of their radio license instead of the regular license numbers.

"It is my understanding that there is a \$1.00 fee to be charged for the exchange of presently held numbered plates for the plate containing their call letters. However, there seems to be some question as to whether or not, in addition to the \$1.00 charge, the licensed amateur must also pay another regular license fee. In other words, if an amateur radio operator's automobile license expired in November 1951 and he has renewed this regular license paying the regular fee, must he again pay this regular fee when applying for his call letter license or is the payment of \$1.00 sufficient to take care of this."

At the outset, we believe it is well to set forth cer-

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tain rules to be followed in the construction of statutes. In the case of State v. Ball, 171 S.W.2d 787, the court has set out the rules which we believe to be applicable in the consideration of House Bill No. 242. At l.c. 792 the court said:

"The primary rule for the construction of statutes is to ascertain the law makers' intention from the words used in the statute. Wallace v. Woods, 340 Mo. 452, 102 S.W.2d 91.

* * * * *

"The general rule as to statutory construction has been stated as follows: 'The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent. * * Intent is the spirit which gives life to a legislative enactment. In construing statutes the proper course is to start out and follow the true intent of the Legislature and to adopt that sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the Legislature.' Sutherland on Statutory Construction, 2d Ed., Vol. 2, Sec. 363."

House Bill No. 242 is primarily a statute which has for its main purpose the substitution of call letters in lieu of numerals on the motor vehicle license plates of amateur radio operators. That part of House Bill No. 242 providing for the payment of fees is Section 1, and reads as follows:

"Owners of motor vehicles who are residents of the state of Missouri, and who hold an unrevoked and unexpired official amateur radio license issued by the Federal Communications Commission, upon application, accompanied by proof of ownership of such amateur radio station license, complying with

Honorable Anthony D. Pickrell

the state motor vehicle laws relating to registration and licensing of motor vehicles as contained in chapter 301, RSMo 1949, and upon the payment of the regular license fee for tags as prescribed under section 301.060 of said chapter 301, and the payment of an additional fee of one dollar, shall be issued a license plate, as prescribed by section 301.130 of said chapter 301, for private passenger cars, upon which, in lieu of the numbers as prescribed by said section 301.130, shall be inscribed the official amateur radio call letters of such applicant as assigned by the Federal Communications Commission."
(Emphasis ours.)

Thus we see that the only provision for payment is the regular license fee for tags, prescribed under Section 301.060, RSMo 1949, plus an additional fee of \$1.00. If a licensed radio amateur has paid the regular license fee for his motor vehicle, we do not believe that the provisions of House Bill No. 242 would require another payment of the regular fee.

In essence, a motor vehicle license plate serves two general purposes. One is for ready identification of the ownership of a motor vehicle and the other is a receipt showing payment of the required license fee for the operation of a motor vehicle upon the roads and highways of the state. It is our understanding that the real purpose of House Bill No. 242 is to readily identify radio amateurs for the aid which they are able to give during emergencies.

House Bill No. 242 was not intended as a revenue measure. The additional payment of the \$1.00 was to help defray the costs of the issuance of the special plates. If House Bill No. 242 were construed to provide for the second payment of the regular license fee, we do not believe that the intended purpose of the law would be effected. We believe this is rather evident because such a requirement would undoubtedly have a deterring effect upon radio amateurs and prevent their applying for and using the special license plates.

We believe it was the intention of the Legislature to encourage the purchase of these plates, and certainly the

Honorable Anthony D. Pickrell

requirement for the payment of a license fee could not be said to be an encouraging factor in accomplishing this purpose.

Although we believe the above to be sufficient, it might be well to point out that the opposite construction could result in House Bill No. 242 being declared invalid as in conflict with constitutional provisions. It is possible that such an interpretation could well be held as a violation of the equal protection clause.

Considering all of the above, we believe that it was the intention of the Legislature that a duly licensed radio amateur shall be issued a license plate upon which is inscribed the call letters of such applicant by the single payment of the fee as set out in Section 301.060, and an additional fee of \$1.00.

Thus in the hypothetical case mentioned in your opinion request, the licensed amateur radio operator would be entitled to a license tag containing his call letters upon proper application and the payment of \$1.00.

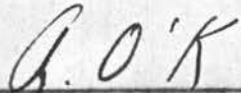
CONCLUSION

Therefore, it is the opinion of this department that a licensed amateur radio operator may make application for a license plate on which is inscribed his call letters upon the payment of the additional fee of \$1.00, as provided for in House Bill No. 242, and that there is no requirement for the repayment of the license fee prescribed in Section 301.060, RSMo 1949.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

Approved:



J. E. TAYLOR
Attorney General of Missouri

JRE:lrt

LIBRARIES: City or town with tax-supported library becoming a part of county library district does not constitute newly established library so as to qualify for establishment grants.

March 28, 1951

3-29-51

Mr. Paxton P. Price
State Librarian
State Office Building
Jefferson City, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this office, which reads as follows:

"We would like to have an opinion by your office on the interpretation of the law as regards the following:

"Section 14736a of the 1945 Laws of Missouri grants the State Librarian and the State Library Advisory Board administration of State Aid to Public Libraries. The law provides for three types of State Aid, namely: an equal per capita apportionment to all public libraries, establishment grants, and equalization grants.

"Establishment grants are specifically available to new county and regional library districts.

"Under the library laws of Missouri it is possible to establish a county library district in exclusion to those territorial portions of the county which already maintain municipal library districts, which means in effect, that the total territory encompassed by the county boundaries has not been reached with the creation of a county library district.

"Therefore, this office would like to know if, when a municipality takes action outlined

Mr. Paxton P. Price

in Section 14722, R.S. Missouri, 1939, making the municipal library district a part of the county library district, such action is to be considered as part of the original or new establishment of the county library district. Can establishment funds, governed by Section 14736a, 1945 Laws of Missouri, be paid to county libraries according to the terms of the law, on the basis that new sections of the county population have been added to the burden of the county library district by actions taken under authority contained in Section 14722, R.S. Missouri, 1939?"

At the outset, we enclose copies of two opinions submitted by this office in 1948 to the Prosecuting Attorney of Dent County and the State Librarian, which we believe will be helpful to you in considering the status of cities and towns having a tax-supported library as distinguished from a county library district, and how the former may become incorporated within said district.

In the opinion to the Prosecuting Attorney of Dent County it was concluded that a city or town maintaining a tax-supported public library is separate and apart from the established library district.

The statute providing for establishment grants to libraries is Section 181.060, R.S. Mo. 1949, which, in part, provides:

"The balance of said moneys shall be administered and supervised by the state librarian to provide establishment grants on a population basis to newly established county or regional libraries and equalization grants on a population basis to county or regional libraries in all districts in which a one-mill or more tax does not yield a dollar per capita to said libraries; and provided further that only a library in a municipality, city, county, region, school district or other library district serving five thousand or more population established by law after January 1, 1947, shall receive grants in aid. * * *" (Emphasis ours.)

Mr. Paxton P. Price

From the above-quoted section it appears that state aid in the nature of establishment grants is only available to "newly established" county or regional libraries. We construe this portion of the statute as referring to new libraries coming into existence.

In the opinion to the State Librarian this office, in construing Section 14772, R.S. Mo. 1939, now Section 182.040, R.S. Mo. 1949, stated:

"Section 14772, R.S. Mo. 1939, sets out the procedure for cities which have a tax-supported library to become a part of the county library system. This section also provides that after the foregoing procedure has been followed, such town or city shall thereafter become a part of the free county library district."

In other words, it appears that, after the statutory procedure as provided in Section 182.040 has been followed, a city or town having an existing tax-supported library merely becomes a part of the county library district or system already in existence. Furthermore, when such has been accomplished the property within said city or town, which had theretofore been exempted from a tax levy for the support of a county library in a county library district, becomes liable to taxes levied for free county library purposes. Thus Section 182.040, R.S. Mo. 1949, in part, provides:

"After the establishment of a free county library, the board of trustees, common council or other legislative body of any incorporated city or town in the county now or hereafter maintaining a free county library as above mentioned, may after approval of such proposed change by the directors of said free county library, notify the county court that such city or town desires to become a part of the free county library system at the beginning of the next succeeding full fiscal year; and thereafter such city or town shall be a part thereof, and the inhabitants shall be entitled to the benefits of such free county library and the property within such city or town shall be liable to taxes levied for free county

Mr. Paxton P. Price

library purposes; provided, the board of trustees, common council or other legislative body of such city or town, as the case may be, may petition the county court and in all other respects proceedings shall be had, as near as may be, as set forth in section 182.010, and the same rate of tax is had in such city or town as under the free county library system in such county."

It will therefore be seen that any financial burden incurred by the addition of new territory to the library district is compensated for, or at least alleviated, by the property located within the additional territory being subjected to the tax levy for library purposes.


CONCLUSION

It is therefore our opinion that a city or town containing a tax-supported public library becoming a part of the county library district or system does not constitute a newly established county or regional library or library district within the meaning of the statute so as to authorize payment of establishment grants.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RFT:ml
Encs (2)

LIBRARY TAX RATE: After a merger of a municipal and a county library district, the tax rate in the municipality shall be the same as in the county.

August 3, 1951

8/7/51

Honorable Paxton Price
State Librarian
Missouri State Library
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

"Section 182.040 of the Missouri Revised Statutes 1949 provides the procedure by which an existing municipal library operating independently within the boundaries of a county-wide library district to become a part of the county-wide library district. The same section provides that upon merging 'The property within such city or town shall be liable to taxes levied for free county library purposes.'

"One particular case in Missouri, now under question is composed of this particular situation: The municipal tax rate for library service is twice the tax rate levied throughout the county for county-wide library service.

"Therefore, the legal question to be answered is upon merging, as provided by law herein quoted, which tax rate prevails in the absorbed municipal library district? Does the old tax rate levied by the municipality prevail, but collected by county officials rather than city officials, or does the tax rate of the absorbing county district prevail, or is the tax rate for the municipality after merging a combination of the old municipal tax rate and the new county tax rate?"

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Part 1 of Section 182.040, RSMo 1949, states:

"After the establishment of a free county library, the board of trustees, common council or other legislative body of any incorporated city or town in the county now or hereafter maintaining a free county library as above mentioned, may after approval of such proposed change by the directors of said free county library, notify the county court that such city or town desires to become a part of the free county library system at the beginning of the next succeeding full fiscal year; and thereafter such city or town shall be a part thereof, and the inhabitants shall be entitled to the benefits of such free county library and the property within such city or town shall be liable to taxes levied for free county library purposes; provided, the board of trustees, common council or other legislative body of such city or town, as the case may be, may petition the county court and in all other respects proceedings shall be had, as near as may be, as set forth in section 182.010, and the same rate of tax is had in such city or town as under the free county library system in such county."

The above section provides that after merger, "the property within such city or town shall be liable to taxes levied for free county library purposes * * *."

The same section provides further that "the same rate of tax is had in such city or town as under the free county library system in such county."

The only meaning which we can attach to the last above quoted section is that after the merger has been effected, the rate of library tax for the residents within the municipality shall be the same as the tax rate for residents of the county living outside the municipality.

CONCLUSION

It is the opinion of this department that after a merger


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of a municipal and a county library district, the tax rate in the municipality shall be the same as in the county.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

HPW:AB

MISSOURI STATE SCHOOLS: Whenever an indigent inmate or patient at
INSANITY HEARINGS: the Missouri State School becomes dangerously
insane, the superintendent of said School
may temporarily place such a patient in a
state hospital for the insane. But the
superintendent of said school shall immediately

February 1, 1951

2/6/51

Mr. B. E. Ragland
Director, Division of
Mental Diseases
State Office Building
Jefferson City, Missouri



cause to be instituted
proceedings in the probate
court of the county where
the school is located to
have the court determine
whether or not such patient
is actually insane so that
said patient may be detained
by the state hospital for
the insane until she is re-
stored to sanity.

Dear Mr. Ragland:

You have requested an official opinion from this department
in regard to the following problem:

"A Patient at the Missouri State School,
Marshall, Missouri, becomes mentally deranged
and beyond the control of that institution.
Does the superintendent of that school have
authority, by virtue of Section 9393, R.S. Mo. 1939, to
transfer such patient to a state mental
hospital for treatment and confinement
without a hearing in the probate court of the
county, from which the patient came originally,
to establish the insanity of such a patient?
The patient is an indigent person.

"It is understood that the patient has never
been adjudged insane, but was received at the
School at Marshall in accordance with the pro-
visions of Section 9392 R.S. Mo. 1939. The
superintendent of one of our mental hospitals
questions the authority of the superintendent
of the State School at Marshall to transfer
such a patient to a mental hospital without a
court order from a court of record."

Section 202.610, R.S. Mo. 1949, (Sec. 9392, R.S. Mo. 1939)
provides the method by which patients may be admitted to the
Missouri State Schools.

The Schools are maintained for feeble-minded and epileptic
persons residing in the state who are unable to support them-
selves or be supported by their parents or guardians. The statutory
method does not provide for a judicial hearing before admission

Mr. B. E. Ragland

to said schools, although the state patients, either of age or over age, may be admitted upon the official application of any judge of a court of record. This section is not quoted herein because it is quite lengthy.

The Supreme Court of Minnesota in the case of *In re: Masters*, 216 Minn. 553, 13 N.W.2d 487, 158 A.L.R. 210, said:

"The original proceedings in probate court resulting in a determination of feeble-mindedness were quite irregular, no formal notice having been given Mrs. Masters of the fact that her own feeble-mindedness was to be inquired into. * * *

"Though Minn. St. 1941, Sec. 525.78, Mason St. 1940 Supp. Sec. 8992-183, requires only such 'notice . . . as the court may direct,' such notice must satisfy the constitutional requirement of 'due process of law.' This prerequisite to a valid commitment cannot be ignored either by the legislature or by a court proceeding as the legislature prescribes. * * *

"Notice in commitment proceedings is not always practicable where the person sought to be committed is violently and dangerously insane. But those types of insanity or feeble-mindedness which manifest themselves in harmless symptoms lend themselves to the orderly processes of a formal hearing and adjudication; and in such cases the constitutional mandates must be strictly observed by giving the person under inquiry not only adequate notice of the fact of a hearing and the purpose thereof, but also every opportunity to be heard before the order of commitment is issued. 28 Am. Jur, Insane and Other Incompetent Persons. p. 676, Sec. 32.

* * * * *

"Clearly, then, no distinction can be made as to the necessity and sufficiency of notice and opportunity to be heard as between normal and abnormal persons. The life of each is equally sacred; the liberty of each must be equally secure in order that the right to the pursuit of happiness may be equally open. See note, 43 Am. St. Rep. 531.

"We do not apologize for discussing these fundamental American concepts; concepts which, in their

Mr. B. E. Ragland

enthusiasm for social welfare, our governmental agencies charged with the duty of caring for society's less fortunate members often inadvertently overlook or deliberately disregard."

You will note from this case that the Supreme Court of Minnesota held that a judicial proceeding which included notice to the feeble-minded and gave persons an opportunity to be heard at the hearing, was required in order to commit an alleged feeble-minded to the state school for feeble-minded.

This case also brings out that where the person sought to be committed is violently and dangerously insane it is not necessary to first give notice of the commitment.

Section 202.630, R.S. Mo. 1949, Subsection 2, (Sec. 9393, R.S. Mo. 1939) provides as follows:

* * * * *

"2. If any patient becomes dangerously insane, and be so certified by the superintendent, he shall be transferred and placed in the state hospital located nearest to the county from which said patient was sent. The expense of transfer to said hospital to be paid for by the county from whence said patient came. (9393)"

The Supreme Court of Vermont in the case of In Re: Allen, 82 Vt. 365, 73 A. 1078, 26 L.R.A. (n.s.) page 232, says:

"At common law an insane person may be temporarily restrained without legal process, and if need be in an asylum, if his going at large would be dangerous to himself or to others, preliminary to the institution of judicial proceedings for the determination of his mental condition, and such a restraint does not violate any constitutional provision. Colby v. Jackson, 12 N.H. 526; Keleher v. Putnam, 60 N.H. 30, 49 Am. Rep. 304; Porter v. Ritch, 70 Conn. 235, 47 L.R.A. 353, 39 Atl. 169; Look v. Deen, 108 Mass. 116, 11 Am. Rep. 323. When however, as in the case at bar, the confinement is permanent in nature, the person thus confined is deprived of his liberty which, in order to be lawful, must be in pursuance of a judgment of a court of competent jurisdiction, after such person has had sufficient notice and an adequate opportunity to defend. It is no answer to say the person is insane and consequently notice to him will be useless,

Mr. B. E. Ragland

for that is assuming as a fact the very thing in question and which is presumed to be otherwise until proved. Such notice and opportunity are required by the Constitution of this State, Art. 10, wherein it reads: 'Nor can any person be justly deprived of his liberty except by the laws of the land, or the judgment of his peers'; and by the Fourteenth Amendment to the Federal Constitution, that no state shall 'deprive any person of life, liberty or property, without due process of law.' Louisville & Nashville R.R. Co. v. Schmidt, 177 U.S. 230, 44 L. ed. 747, 20 Sup. Ct. 620; Simon v. Craft, 182 U.S. 427, 45 L. ed. 1165, 21 Sup. Ct. 836; * * * (Underscoring ours)

The Legislature of Missouri has provided a statutory procedure to follow in cases involving the transfer of inmates from charitable institutions to a state hospital for the insane. This statute fully complies with the statutory requirement of due process. It is Section 202.340 R.S. Mo. 1949, (Sec. 9344, R.S. Mo. 1939, Laws 1945, page 905) and reads as follows:

"202.340. Transfer of inmates of charitable institutions to state hospitals.--1. Whenever an inmate of a private or public charitable institution for the maintenance and care of indigent persons shall become insane, any citizen may file in the probate court of the county where such institution is located, a statement in writing substantially complying with the form set forth in section 202.130, and shall in addition thereto allege in said statement the county in this state of which said insane person was resident immediately prior to his admission to said charitable institution.

"2. The clerk of the probate court in which such statement is filed shall proceed therewith as provided in section 202.140, and shall forward to the clerk of the county court of the county of which said insane person is alleged to have been a resident immediately prior to his admission to said charitable institution, a copy of such statement and a notice of the place and time when said statement will be presented to the court, which shall not be less than twelve days after the notice is deposited in the mail as herein provided. The copy of said statement and said notice shall be placed in a well-secured envelope, directed and addressed to the clerk of the county court of the county to whom the same is herein required to be forwarded, deposited

Mr. B. E. Ragland

in the post office, postage prepaid, and registered in accordance with the postal laws of the United States of America; the return of such service shall be endorsed on a copy of the notice so sent by the clerk or his deputy and shall be conclusive evidence of the matters therein contained, and shall confer complete jurisdiction upon the court in which the statement is filed to hear and determine the same; provided, however, the alleged insane person shall be entitled to the notice provided for in Section 202.140.

"3. Said probate court shall hear said matter on the date mentioned in said notice or upon any day to which said court shall adjourn or continue the hearing thereof, in the manner now provided for resident insane persons. If the person charged shall be found by the court to be insane and indigent and to have been a resident of the county as alleged in said statement immediately prior to his admission to said charitable institution, its judgment shall entitle said person to admission to a state hospital upon the same terms as resident insane and indigent persons, and the county of which such insane and indigent and to have been a resident immediately prior to his admission to such charitable institution shall pay all costs and expenses and provide all things required by sections 202.010, 202.070, 202.100, 202.120 to 202.240, 202.270 to 202.320, 202.340, 202.350, 202.430 to 202.450, 51.160, 546.510 to 546.540, and 549.050, RSMo. 1949, the same as if said person had been sent to the state hospital as an indigent insane person by order of the court of the county of which he is found to have been a resident immediately prior to his admission to said charitable institution. (9344, A.L. 1945 p. 905)"

Therefore, in order for the former patient of the Missouri State School to be permanently detained by the state hospital for the insane, the superintendent of the Missouri State School should comply with this section in order that the probate court may determine whether or not the patient is actually insane.

If the probate court finds that the patient is not insane then it must be transferred back to the Missouri State School. If the probate court finds at the hearing provided for in this section that the patient is insane, then the patient shall become the patient of the state hospital and be held there until

Mr. B. E. Ragland

restored to sanity. The Supreme Court of Missouri in the case of *In re: Moynihan*, 62 S.W. 2d, 410, recognized the right to arrest and restrain until hearing one who is so deranged as to endanger himself or others as was done in this case and cited the notes in 10 A.L.R., 488 and 45 A.L.R. 1464. The notes in 10 A.L.R. include a citation to the Allen case, cited above, and also the following notes on page 489:

"But insanity which does not render one dangerous to himself or others will not justify his arrest and detention without judicial proceedings. *MAXWELL v. MAXWELL* (reported herewith) ante, 482; *Witte v. Haben* (1915) 131 Minn. 71, L.R.A. 1916C, 228, 154 N.W. 662, Ann. Cas. 1917D, 534 (reasonable suspicion of insanity which is not dangerous is not a defense); *Look v. Dean* (1871) 108 Mass. 116, 11 Am. Rep. 323; *Keleher v. Putnam* (1880) 60 N.H. 30, 49 Am. Rep. 304; *Emmerich v. Thorley* (1898) 35 App. Div. 452, 54 N.Y. Supp. 791.

"Although recognizing the rule that a dangerous maniac may be temporarily restrained until he can be arrested on legal process, the court in *Keleher v. Putnam* (1880 60 N.H. 30, 49 Am. Rep. 304, supra, said: 'But not every insane person is dangerous. Nothing can be more harmless than some of the milder forms of insanity. Nor is it any justification that the defendants were actuated by a desire to promote the plaintiff's welfare. The right of personal liberty is deemed too sacred to be left to the determination of an irresponsible individual, however conscientious. The law gives these unfortunate persons the safeguards of legal proceedings and the care of responsible guardians.'

"So it will be observed that, in the reported case (*MAXWELL v. MAXWELL*, ante, 482), the right to restrain an insane person of his liberty is limited to cases of actual insanity and immediate danger to the person in question or to the public."

The Supreme Court of Missouri in said *Moynihan* case also said:

"Concerning due process of law in insanity hearings, the Supreme Court of the United States said in *Simon v. Craft*, 182 U.S. 427, 21 S. Ct. 836, 840, 45 L. Ed. 1165; 'The due process clause of the 14th Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only

Mr. B. E. Ragland

that there shall be a regular course of proceedings in which notice is given of the claim asserted, and an opportunity afforded to defend against it.' See, also *Chaloner v. Sherman*, 242 U.S. 455, 37 S. Ct. 136, 61 L. Ed. 427; *White v. White*, 108 Tex. 570, 196 S.W. 508, L.R.A. 1918A, 339."

* * * * *

"However, even though an insanity proceeding is primarily for the benefit of the person suspected of being insane, nevertheless depriving a person of his liberty and his freedom to do as he sees fit with his property and putting him under the stigma of irrationalism is such a serious matter that there should be, for the person whose sanity is inquired into, every proper safeguard. As this court said in the *Searcy* and *Shanklin* Cases, declaring unconstitutional the statute authorizing such hearings without notice: 'If he be a raving maniac, he can appear by attorney or through his friends, and see that a proper person is appointed guardian, or that a proper care is given to his property and to his person. In addition what if the person was not really insane at all, and without notice was adjudged insane and confined in an asylum, and the management of his property given to another? In such contingency the propriety of notice would be manifest, and, if given, would defeat the recovery of a judgment. It will not do to say that, in the 57 years that these provisions not requiring notice have been on the statute books, no instance is recorded of any sane person being so adjudged and deprived of his liberty or property, and that instances of such outrages are found only in highly colored and improbable stories in works of fiction. For the *Marquis* case (85 Mo. 615) is an instance in our own reports where a citizen was so adjudged insane without notice, and at the very next term of court appeared and proved that he was not, and never was, insane. But however the past experience may have been, the fact remains that the possibility of such an outrage being perpetrated is afforded by the statutory provisions referred to; and it is the duty of the

Mr. B. E. Ragland

courts, whenever the question arises, to prevent the happening of such a wrong, by declaring those provisions to be unconstitutional."

* * * * *

"* * *At that time, however, the provision for bringing the person informed against as insane before the court was repealed, and the provision, declared unconstitutional in the Searcy and Shanklin Cases, for proceeding without either requiring him to be present or to have notice, was adopted. This defect was remedied in 1917, after the latter decision by requiring service of reasonable notice on the alleged insane person. Laws of 1917, p. 102, now section 450, R.S. 1929 (Mo. St. Ann. Sec. 450). This court has recently held that this requirement of reasonable notice cannot be waived by the party alleged to be incompetent or his attorney. State ex rel. Terry v. Holtkamp (Mo. Sup.) 51 S.W.(2d) 13; State ex rel. Townsend v. Mueller (Mo. Sup.) 51 S.W.(2d) 8. * * *"

* * * * *

"* * *We therefore hold that a person alleged to be insane has the right under section 448, R. S. 1929 (Mo. St. Ann. Sec. 448), to a trial by jury in the probate court, if a trial by jury is demanded either by such person or by counsel acting in his behalf; * * *"

The Supreme Court of Missouri recently in the case of State v. Green, 232 S.W. 2d 397, said:

"Due process of law implies and comprehends the administration of laws equally applicable to all under established rules which do not violate fundamental principles of private rights, and in a competent tribunal possessing jurisdiction of the cause and proceeding upon notice. It is founded upon the basic principle that every man shall have his day in court, and the benefit of the general law which proceeds only upon notice and which hears and considers before judgment is rendered and which renders judgment only after trial. This provision of our organic

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law guarantees that every one shall have his life, liberty, property and immunities protected by the general rules characteristic of, basic to and existing in our society under our system of jurisprudence. It contemplates an orderly proceeding adapted to the nature of the case and as to which any person to be affected shall have notice, an opportunity to be heard, and a chance to protect and enforce his rights before a tribunal with power to hear and rule his cause. * * *

The Supreme Court of California in the case of *In re: Lambert*, 134 Cal. 626, 55 L.R.A. 856, 66 P. 851, held that a statute which permitted commitment to and retention in a hospital for the insane, upon an application for a relative or a friend of the alleged insane person, or by anyone of certain officials, accompanied by the certificate of two physicians, without any provision for notice to the alleged insane person, was unconstitutional as depriving him of liberty without due process of law. The California statute authorized the judge of the superior court of the county to issue the commitment forthwith upon presentation of the application and certificate of the two medical examiners. The court in this case said:

"The case before us does not involve the right of the state to provide for the summary arrest of a person against whom a charge of insanity is made, and his temporary detention until the truth of the charge can be investigated. Such arrest would itself be a notice to him of the charge, under which he would be afforded an opportunity for a hearing thereon. Nor is there involved the right of the state to permanently restrain an insane person of his liberty, whether such person be harmless or dangerous, but the question is whether he is entitled to a judicial investigation of the charge that he is insane, and the right to be heard thereon before its determination. The question to be determined is not whether the action of the judge in investigating the insanity of the petitioner was conducted under the forms of law, and with proper regard for his rights, but whether the judge had the right to enter upon the investigation, or take any action whatever in reference to his insanity. In the absence from the statute of any requirement of notice to the person, any notice that might be given him would be without legal

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force and authority, and consequently, whether acted upon by him or disregarded, the proceeding would be equally ineffective. 'It is not enough that he may by chance have notice, or that he may, as a matter of favor, have a hearing. The law must require notice to him, and give him the right to a hearing, and opportunity to be heard. The Constitutional validity of a law is to be tested not by what has been done under it, but by what may by its authority be done.' Stuart v. Palmer, 74 N.Y. 188, 30 Am. Rep. 291. 'It is not what has been done, or ordinarily would be done under a statute, but what might be done under it, that determines whether it infringes upon the constitutional right of the citizen. The constitution guards against the chances of infringement.' Bennett v. Davis, 90 Me. 105, 37 Atl. 865.

"The following authorities may be referred to in support of the foregoing views: Underwood v. People, 32 Mich. 1, 20 Am. Rep. 633; In re Doyle, 16 R.I. 537, 18 Atl. 159, 5 L.R.A. 359, 27 Am. St. Rep. 759; State v. Billings, 55 Minn. 467, 57 N.W. 206, 794, 43 Am. St. Rep. 525; City of Portland v. City of Bangor, 65 Me. 120, 20 Am. Rep. 681; Bennett v. Davis, 90 Me. 102, 37 Atl. 864; People v. St. Saviour's Sanitarium, 34 App. Div. 363, 56 N.Y. Supp. 431. In the case last cited the question was quite fully considered by the general term of the supreme court of New York. The relator had been committed to an asylum for inebriates for the term of one year under a provision of a statute of that state authorizing such commitment to be made by any judge of a court of record upon a certificate in writing, signed by two physicians, containing statements bringing the person within the description named in the statute. It was held that as the order had been made without any notice to the relator, and without her presence, she was deprived of her liberty without due process of law, and that the commitment was void; the court very tersely and aptly phrasing the principle underlying its decision as follows: 'No matter what may be the ostensible or real purpose in restraining a person of his

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liberty,--whether it is to punish for an offense against the law, or to protect a person from himself, or the community from apprehended acts,--such restraint cannot be made permanent or of long continuance unless by due process of law.'

"Under the foregoing considerations, it must be held that the insanity law of 1897, to the extent that it authorizes the confinement of a person in an insane asylum without giving him notice and an opportunity to be heard upon the charge against him is unconstitutional, and that the proceedings by virtue of which the petitioner is held by the respondent, are invalid.

The Supreme Court of Vermont in the Allen case cited above, said:

"For the purpose of making such a certificate any two legally qualified physicians, residents of the State, may be selected by those interested in having the person confined in an asylum, as insane, regardless of their actuating motives. The physicians are required to make their examination of the person within five days before making the certificate, and to make oath to their certificate, but they are neither designated, nor appointed, nor commissioned, by any court or public authority to act in that capacity. The examination may be made by them anywhere and under any circumstances permitting it, without notice to, or knowledge by, the supposed insane person, and solely upon such examination their certificate may be based. They are not obliged to hear other evidence, even though offered by the person examined or in his behalf to show his sanity, and if they do hear evidence so offered, it is as a mere matter of favor on their part. Such a proceeding is entirely devoid of the essential elements of due process of law. Moreover, if a person's right of hearing depends upon the grace, favor, or discretion of the persons, board, or tribunal whose duty it is to decide the question at issue, he is not protected in his constitutional right. The law must require notice to him, give him a right to a hearing, and an opportunity to be heard."

28 Am. Jur., page 664, Sec. 14, states the general rule in regard to notice to be given:

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"Contrary to earlier English practice, the general rule in the United States is that whatever the purpose of a proceeding to determine the sanity of a person may be, notice thereof must be given him if he is to be bound by an adjudication of incompetency made therein, unless notice is dispensed with by the court for a valid reason. This rule is applicable notwithstanding the statute makes no special provision as to notice. Moreover, notice to a person of proceedings to have him declared insane is generally regarded as essential to due process of law, especially if the proceeding may result in the commitment of the alleged incompetent to an institution for the insane. * * *

44 C.J.S., page 166, sec. 67(f) states:

"In the absence of statute, the manner of determining the issue of fact as to the incompetency of the person whose liberty is sought to be restrained is within the sound discretion of the court, as long as the method adopted is fair and orderly. Ordinarily he is entitled to a public hearing or inquest, an opportunity to be present and defend the taking of proofs, a full investigation of the facts, and a judicial finding of the facts requisite for the order of commitment. His presence however, may be dispensed with, as where it appears that his presence would be injurious to him, or attend with no advantage, and statutes so providing have been held constitutional where they provide for an appeal at which the person could have a hearing and be present. Under a statute giving the person alleged to be insane the right to appear and defend, the right is a right to be present in person or by attorney or both, and one who is not a fit person to appear in the proceeding but who is represented by counsel is not denied the right to appear and defend."

Smoot's Law of Insanity, at page 118 to 121, Sec. 159, gives the three proceedings that must be followed for a commitment of an alleged insane person: (1) there should be some form of application for commitment, (2) there must be some form of notice

Mr. B. E. Ragland

sufficient to apprise the alleged non compos person of the contemplated commitment and of the time and place of any hearing preliminary thereto, (3) there must be some form of judicial procedure in the course of which the alleged non compos has the opportunity to appear, either personally or through representatives, and be heard. He states that it has been repeatedly held that statutes prescribing the form of such hearings, which ignore or reasonably restrict this right, (notice and hearing) are unconstitutional and void, as tending to deprive an individual of his liberty without due process of law.

Smoot's Laws of Insanity at page 86, also states: "It has been held that states attempting to delegate this power (to hold hearings) to agencies not charged with the exercise of judicial powers will be void. For example the statute may not delegate such powers to a clerk of the court or to a committee of physicians, etc."

We believe that said section 202.340, R.S. Mo. 1949, fully complies with the requirements of due process in requiring notice to the patient of a charitable institution and a hearing on the question of the alleged insanity before the probate court. This section should therefore be followed because the superintendent of the Missouri State School does not have the power to determine the question of insanity of any of the patients in said school.

CONCLUSION

It is the conclusion of this department that whenever an indigent inmate or patient at a Missouri School becomes dangerously insane, and it is so certified by the Superintendent, that the Superintendent of said School may transfer said patient to the state hospital, located nearest to the county from which said patient was sent, to be detained therein temporarily until such patient has been adjudged insane. But the Superintendent of said School does not have authority to permanently commit any patient of said school to a state mental hospital for permanent treatment and confinement as an insane person. The superintendent of said School should comply with the provisions of Section 202.340 R.S. Mo. 1949, immediately after the alleged dangerously insane patient has been transferred to the state hospital.

Respectfully submitted,

APPROVED:

ok
J. E. TAYLOR
Attorney General

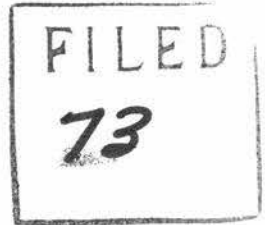
STEPHEN J. MILLETT
Assistant Attorney General

SJM:mw

STATE CLAIMS: An agency of the state having power to sue is also authorized to settle a claim in behalf of the state and execute a valid release of future liability.

May 18, 1951

Mr. B. E. Ragland
Director, Division of Mental Diseases
State Office Building
Jefferson City, Missouri



Dear Mr. Ragland:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"Official State Car No. 100, assigned to the Director of the Division of Mental Diseases, when properly parked was struck by a Jefferson City bus and somewhat damaged.

"A bill has been presented to the Jefferson City Bus Company for damages, which bill the bus company seems disposed to pay but their attorney raises the question as to who, if anybody, in the state government has the authority to execute a valid and effective release of all claims for damages against the car in question.

"I desire an official opinion of your department on the question as to whether or not there is anyone in the state government who has authority to execute an official release in the event that there is satisfactory evidence that damages in full are being paid, and if so who has that authority and how can the execution of a valid and effective release be accomplished."

The Department of Public Health and Welfare, of which the Division of Mental Diseases is a part, is an agency of the state invested with certain administrative functions. The director of the department, by authority of Section 191.120, RSMo 1949, is trustee for the state-owned property assigned to him for the use of his department and its various divisions. He is also vested, under Section 191.130, with power to bring suit in any court of competent jurisdiction for all debts and demands due any of the institutions subject

to the control of his department and for trespass and other wrongs to any property assigned to his supervision and care.

The Supreme Court of Missouri has laid down the rule that an agency of the state having power to bring suit is also authorized to settle claims by agreement on behalf of the state. In the case of Iron Mountain and Southern Railway Company v. Anthony, 73 Mo. 431, l.c. 434, the court said:

"The power to sue implies the power to accept satisfaction of the demand sued for, whether the precise amount demanded or less."

The Supreme Court in a more recent decision sustained this principle in the case of State v. Smith, 201 S.W. (2d) 153. In the course of that opinion, at l.c. 157, the court said:

"Respondent contends that since the Sales Tax Act gives him the power to sue for the tax, it necessarily gives him the implied power to settle the tax, except where he is prohibited from doing so by law. He, therefore, contends that he has the power to compromise interest and penalties. We think respondent's contention must be sustained. * * *"

CONCLUSION

It is the opinion of this office that the Director of the Department of Public Health and Welfare is authorized to settle a claim for damages against a state-owned automobile assigned to the Director of the Division of Mental Diseases and to execute a valid and effective release of all future liability.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

INSANE PERSONS: Insane persons discharged from state hospitals after having been found insane by a court of this state must be adjudged sane by a court of this state in order to have the right to vote and manage their affairs. Insane persons admitted to a state mental hospital on certification of two qualified physicians and discharged by the superintendent of said hospital have the right to vote and manage their affairs after their discharge by the superintendent.



May 23, 1951

6-7-51

Honorable B. E. Ragland, Director
Division of Mental Diseases
Department of Public Health & Welfare
State Office Building
Jefferson City, Missouri

Dear Mr. Ragland:

This will acknowledge your letter of April 7, 1951, in which you request an opinion concerning the rights of a person adjudged non compos mentis by any court in this state; also the rights of a person admitted to a mental hospital on certification. Your letter reads as follows:

"Will you please give me your official opinion on the following questions.

"Does any person previously adjudged to be of unsound mind by any court in the State of Missouri and who has been discharged by the superintendent of the hospital to which he was committed have the right to vote and manage his affairs?

"Also, if a person was admitted to a state mental hospital on the certification of two qualified physicians and was discharged by the superintendent of said hospital, would this person have the right to vote and manage his affairs?"

Methods are provided in our Revised Statutes of 1949 for various ways of handling insane persons, both by our courts and by the division of mental diseases of this state. Chapter 202, Mental Hygiene, Section 202.070 providing for the admission and discharge or parole of the insane has a provision for the discharge as well as for the admission of insane persons. It provides also for a release to be had by proceedings in the probate courts as provided in Section 458.530, RSMo 1949.

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Chapter 202 also has a provision for the admission to state hospitals of the insane poor through an inquisition to be held by the probate court. There is another provision in the same chapter providing for the admission of private patients upon the affidavit of two physicians that a patient is insane, that is in Section 202.270, which reads as follows:

"Pay patients, or those not sent to the hospital by order of the court, may be admitted on such terms as shall be by this chapter and the bylaws of the hospital prescribed and regulated."

Chapter 202 also provides for the transfer of inmates of charitable institutions to the state hospital in Section 202.340, and for the admission of drug addicts in Section 202.360.

Section 202.070, RSMo 1949, reads as follows:

"Who may be admitted-how discharged, or paroled.- Persons afflicted with any form of insanity shall be admitted into the hospitals for the care and treatment of same. Any patient so admitted may be discharged or paroled whenever in the judgment of the superintendent and his staff such person should be discharged or paroled. The decision of the superintendent and his staff on such matter shall be final and the respective counties of this state are hereby prohibited from removing any indigent insane person unless such insane person is discharged as herein provided; provided, however, any person found to be restored to his right mind under proceedings had in the probate court as provided for in section 458.530, RSMo 1949, shall be forthwith discharged upon delivery to the superintendent of the hospital a certified copy of the record in the restoration proceedings; provided further, in any restoration proceedings under said section 458.530, RSMo 1949, if it is found that the patient is not represented by an attorney, the court shall appoint an attorney to represent him in such proceedings, and if it is further found that such patient is unable to pay an attorney's fee for services rendered in such proceedings,

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the court may in its discretion, allow a reasonable attorney's fee for such services, which fee shall be assessed as costs and paid by the county together with other costs in such proceedings."

Section 458.530, RSMo 1949, provides for the proceedings to be had in the probate court on recovery of sanity. Said section is as follows:

"For and on behalf of any person previously adjudged to be of unsound mind by any court in the state of Missouri, there may be filed in the probate court of the county wherein he was adjudged insane, a petition in writing, verified by oath or affirmation, alleging that subsequent to his adjudication of insanity he has fully recovered his mental health and been restored to his right mind and is now capable of managing his affairs, and the probate court wherein any such petition is filed shall hold an inquiry as to the sanity of the person in whose behalf the petition is filed; provided, that if said court, upon such inquiry, shall find that such person is not restored to his right mind, and such person, or anyone for him, shall within ten days after such finding, file with the court an allegation in writing, verified by oath or affirmation that such person is of sound mind and is aggrieved by the action and finding of the court, the court shall then cause the facts to be inquired into by a jury."

It may be observed that this proceeding may be taken by the reservation contained in Section 202.070, quoted above, regardless of the attitude of the superintendent of the particular hospital toward the mental capacity of a particular patient.

There are various means prescribed for the handling of the criminal insane in this state and specific statutory proceedings have been set out in each of those. It is observed here that under Section 202.070, supra, that the superintendent may discharge or parole a patient. In accordance with an opinion previously rendered by this department, July 27, 1945, to

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Honorable W. R. Painter, an indigent insane patient who had been discharged from an asylum could not be readmitted without being readjudicated as insane. In that opinion, it was also said that where a patient was paroled, conditionally, the parole could be revoked and the patient returned and confined for further treatment.

Section 458.530, supra, refers in its text to adjudication by "any court," whereas Section 202.070, supra, provides for a discharge by the superintendent.

Long before the present mid-twentieth century reformation and streamlining of our state statute law in regard to the affairs of our insane citizens in the matter of McWilliams, 254 Mo. 512, 513, Judge Faris for the Supreme Court, said:

"The probate court had jurisdiction and plenary power to adjudge petitioner to be a person of unsound mind. Petitioner will continue to be regarded in law as non compos for all general and usual purposes till the probate court or a jury shall have found him to be sane. The legal machinery to re-examine petitioner's status, is ample, simple, convenient and summary.

* * * *

"The status of an insane person not charged with a crime is different from that of an insane person charged with a felony (and the rule must be the same whether the insanity be kleptomania or homicidal mania). If no charge of felony be pending the guardian appointed by the probate court has complete dominion under the orders of that court over his insane ward. But manifestly the guardian ought not to have such power in case his ward is charged with a felony, so that if he wish he can take his ward to Kansas or Kamschatka. The criminal court becomes interested in seeing that the insane accused is, and will be, within the jurisdiction of the court when he recovers, and that he be held at some accessible place within the court's jurisdiction, so that the fact as to whether he has recovered may be tested from time to time, if necessary."

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At the time of the above opinion, the superintendent of the insane asylum had the power to discharge patients or to parole them, Sections 1392 and 1404, R. S. Mo. 1909. This matter was not considered in the above opinion since that opinion was written refusing a writ of habeas corpus to the petitioner who was held by the sheriff subsequent to the alleged commission of certain felonies and subsequent also to having had a guardian appointed by the probate court on the grounds that he was non compos mentis.

In the case of State ex rel. Moser v. Montgomery et al., 186 S.W. 2d 553, the Kansas City Court of Appeals considered the right of county courts to hold an inquisition in order to adjudge a person sane who had previously been adjudged of unsound mind. The court said, l.c. 554, 555:

"The only statute which makes any provision for the release or discharge from a state hospital of an indigent patient so committed, is Sec. 9321. The pertinent part of that section is: '* * * Any patient so admitted may be discharged or paroled whenever in the judgment of the Superintendent and his staff such person should be discharged or paroled. The decision of the Superintendent and his staff on such matter shall be final and the respective counties of this State are hereby prohibited from removing any indigent insane person unless such insane person is discharged as herein provided.' It is clear that this section does not authorize the county court to conduct such a hearing as was desired in this case.

"For many years prior to the adoption of our present Constitution in 1875, the county court also had probate jurisdiction and, during that time, it was specifically authorized to conduct a hearing, if an application was made alleging that a person who had been declared of unsound mind by that court, had regained his mental faculties. Sec. 39, Chap. 40, R.S.1865. But the Constitution of 1875 authorized the establishment of probate courts, which was later done by legislative act, and they were given exclusive jurisdiction over matters pertaining

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to probate business, thereby relieving the county courts of any such jurisdiction. They were also given exclusive jurisdiction to conduct lunacy hearings when guardians and curators were to be appointed. At about the same time the Legislature transferred to the probate code what is now Sec. 492, supra, thus transferring to the probate courts specific authority to inquire whether a person who had been declared of unsound mind by that court had been restored, and left no similar statutory authority in the county courts."

The court held that the county court was without jurisdiction to determine whether such a person had recovered his sanity. The court made no comment regarding the sanity or insanity of Moser or in regard to his legal status. Moser had been discharged from State Hospital No. 2 by the acting superintendent thereof. No reason was given for his discharge. The action was brought in the county court to establish Moser's sanity so that he could collect an amount owed him by an insurance company. The Appellate Court made no pronouncement as to Moser's legal disability by reason of his initial adjudication in the county court. Since he was not adjudicated non compos mentis by the probate court and had no guardian appointed for him, absent some new found procedure by the order of the county court of Jackson County, June 2, 1927, unless his discharge by the superintendent can be determined to mean a legal record of his restoration to sanity, Moser is still insane.

In State v. Brockington, 162 S.W. 2d 860, Commissioner Bohling of our Supreme Court, in a motion to modify a death sentence from hanging to execution in the gas chamber, said l.c. 862:

"(3) Brockington's commitment to State Hospital No. 2 was not had under proceedings by which individuals are ordinarily committed to such institutions. Section 8629, R.S. 1929, Sec. 9321, R.S. 1939, Mo. R.S.A. Sec. 9321, as modified by Laws 1937, p. 513, in so far as it may authorize the discharge of an insane convict must be read in connection with applicable statutory provisions (quoted supra) relating to the commitment to State Hospitals of convicts becoming

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insane pending the execution of the sentence assessed against them. Consult Secs. 4190-4195, R.S. 1939, Mo. R.S.A. Secs. 4190-4195, as modified by Laws 1939, pp. 353, 354. It would do violence to the spirit and letter of said statutory provisions to hold that the officers of such Institutions, vested with authority to discharge persons committed thereto because of insanity, may blandly discharge therefrom convicts whose sentences stand unexecuted by reason of their insanity without affording due opportunity to other law enforcement officers of the State to carry into execution the judgments of our courts having criminal jurisdiction, thus tending to hinder the administration of the criminal laws in such instances. The statutes contemplate as did the warrant of the Governor committing Brockington to State Hospital No. 2 that those responsible for the receipt and restraint of Brockington at said Institution would give due notice of his restoration to reason to the Governor and otherwise comply with the laws and orders of the duly constituted State officials and tribunals to the end that the judgment and sentence of the court, temporarily suspended during Brockington's insanity, be carried into execution in accord with due process of law. This, from recitals in the State's motion, appears to have been not effected. It follows that Brockington has never been discharged from State Hospital No. 2 within the meaning of our statutory provisions relating to the confinement and treatment of convicts becoming insane pending the execution of a judgment assessing their punishment. Until the statutory provisions relating thereto are complied with, other matters need not be discussed.

"The motion to modify is overruled."

There is no question raised in regard to whether Brockington had sufficiently recovered his sanity or his legal status as being sane. The court considered only that the statutes had

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not been followed, i.e., the Governor notified as to the recovery of Brockington at the proper time. The Court held that he had never been discharged from the hospital. The Court simply declined to discuss other matters until statutory proceedings were complied with. There is statutory procedure for restoration of insane criminals which it may be presumed from the text of this case must have strict compliance. We have been unable to find direct reference made to the legal sufficiency of discharge by hospital superintendents in this state to establish legal presumption of sanity. It is held in *Pheiffer v. Pheiffer*, 118 P. 2d 158, 1.c. 163 (9):

"The discharge of a ward from a hospital for the insane does not vacate the guardianship. 32 C.J. 665, Sec. 284. In 28 Am. Jr. 679, sec. 36, we find the following statement: 'The courts have largely relied upon the opinions of qualified physicians and alienists in testing the advisability of discharging those confined to insane asylums, but have, at the same time, recognized that the determinant factors in such situations are not necessarily the same as those which decide the discharge of a committee or guardian of an incompetent. In the latter instance, entirely different considerations are involved from those which arise in discharging the person of a lunatic from custody.'

"A discussion of the distinction last above mentioned will be found in the Oregon case of *In re Sneddon*, 76 Or. 470, 149 P. 527. A discussion of this question is also found in the case of *Ex parte Streeper*, 93 N.J. Eq. 102, 115 A. 582, 584, wherein it is stated: 'It would seem entirely clear that a man may be mentally afflicted in such nature or degree as to render him incapable of managing himself or his affairs, and hence to require the appointment of a guardian for his person and property, and still not be mentally afflicted in such nature or degree as to warrant or require his confinement in the state hospital.'"

It is held in *Stoltze v. Stoltze*, 66 N.E. 2d 424, (Ill.) 1.c. 429:

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"The legal presumption is that all persons of mature age are sane, but after they have been adjudged insane the presumption is reversed until it is rebutted by evidence that they have become sane. When the transaction complained of occurred before the inquest is had, the proof of insanity devolves upon the party alleging it. It is otherwise if it took place afterwards. The legal presumption of sanity continues until inquest is had. Then the presumption may be reversed until it is rebutted by evidence showing that sanity has returned. McGregor v. Keun, 330 Ill. 106, 161 N.E. 99."


CONCLUSION

It is therefore the opinion of this department that where a person is adjudged to be of unsound mind by a court in the State of Missouri, he must have an inquisition of sanity adjudging him sane before he has the right to vote and manage his affairs. If a person is admitted to a state mental hospital on the certification of two qualified physicians, a discharge by the superintendent of said hospital would restore to such person his right to vote and manage his affairs.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

JWFab

SCHOOLS: Tuition payable to a consolidated high school district by common school district may be paid from either teachers' fund or incidental fund.

5-4-51

April 5, 1951

FILED

74

Honorable Matt H. Reichert
Prosecuting Attorney
Wayne County
Greenville, Missouri

Dear Sir:

This will acknowledge your recent letter, with enclosure of letter from the County Treasurer of Wayne County, requesting an opinion on the question whether a school warrant may be lawfully drawn on the teachers' fund by a rural school district in favor of a consolidated high school district, for the payment of tuition due said high school district.

Section 165.110, R.S. Mo. 1949, among other things, provides for the disbursement of school moneys out of six separate funds which are created by the statute. Among these six funds are the teachers' fund and the incidental fund. The statute further provides that the treasurer shall open an account for each fund, and then declares what money shall be deposited in each particular fund when it is received.

Regarding the matter of tuition fees received by a school district, such as a consolidated high school district, it appears that such fees shall be placed to the credit of the teachers' fund. Thus the afore-mentioned section, in part, provides:

"The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the teachers' fund, except as herein provided. * * *"

Honorable Matt H. Reichert

However, your question asks from which fund may tuition be paid by a common school district which is sending pupils to a consolidated high school district.

We have pointed out that the statute specifically provides for the fund in which tuition fees received shall be deposited, and we believe that the statute also clearly provides, without any ambiguity, the fund or funds from which tuition may be paid. Thus Section 165.110 further provides:

"No treasurer shall honor any warrant unless it be in the proper form, and each and every warrant shall be paid from its appropriate fund, as provided by law. No partial payment shall be made upon any school warrant, nor shall any interest be paid upon any such warrant; provided, that tuition shall be paid from either the teachers' or incidental funds if no part of the minimum guarantee is used for such purposes; provided, further, tuition and transportation costs shall be paid from either the teachers' or incidental funds when the school in any district has been closed on account of temporary combination or low average daily attendance, as provided by law; * * *" (Emphasis ours.)

From the above-quoted portion of the statute it appears that when a common school district sends its pupils to a consolidated high school district in order that they may attend the higher grades, the tuition which the common school district must pay may be paid from either the teachers' fund or the incidental fund if no part of the minimum guarantee is used for such purposes.

The minimum guarantee referred to in the statute would be the amount of money allotted by law out of the public school fund of the state for each elementary teaching unit to which the common school district would be entitled. Said amount would be \$750.00 for each teacher. It is so provided for in Section 161.040, R.S. Mo. 1949.

Construing Section 165.110, supra, as relating to the payment of tuition, it is our view that the common school district could pay the tuition due a consolidated high school district from either the teachers' fund or the incidental fund, with the

Honorable Matt H. Reichert

one limitation that none of the minimum guarantee, that is the \$750.00 for each teacher, could be used for the payment of such tuition. Consequently, so far as the teachers' fund is concerned, only those funds contained therein in excess of the \$750.00 minimum guarantee could be used for the payment of tuition.

We are familiar with the case of Linn Consol. H. Sch. Dist. v. Pointer's Creek Pub. Sch. Dist., 203 S.W. (2d) 721, wherein the Supreme Court of Missouri was considering Section 10366, R.S. Mo. 1939, now Section 165.110, supra, in connection with the payment of tuition. The court, in stating the fund from which tuition should be paid, said at l.c. 723:

" * * * But defendant says that tuition to another district is payable only out of the teacher fund and cannot be paid out of the incidental fund, citing Section 10366, Revised Statutes of Missouri 1939, Mo. R.S.A., amended 1943, page 893. The statute does not so read. It requires the setting up of six separate funds among which are a teacher fund and an incidental fund. It provides that all tuition received by a district from outside pupils shall be placed in the teacher fund. Probably this is because the teacher burden is thus increased in the receiving district, but the statute is silent as to the fund which must be used to pay tuition to another district. We think the tuition which a district is compelled to pay to another district by Section 10458, cannot be paid out of the teacher fund and must be paid from the incidental fund."

In following the reasoning of the court in the above case it appears it held that tuition was only payable from the incidental fund because Section 10366 was silent as to the fund which must be used to pay tuition to another district.

Section 10366, R.S. Mo. 1939 (Section 165.110, R.S. Mo. 1949), which the court was construing in the above case, was amended in 1943. Prior to its amendment the statute made no provision for the fund or funds from which tuition should be paid, and therefore was silent as to the fund which must be used to pay tuition to another district. It is possible that

Honorable Matt H. Reichert

the court in writing its decision confused the provisions of Section 10366 as it appeared prior to the amendment with the provisions therein contained after the amendment. In any event, it does not now appear that the afore-mentioned section is silent in regard to the fund from which tuition must be paid. We feel confident that the Supreme Court will so hold if the question comes before it.


CONCLUSION

It is therefore the opinion of this department that the county treasurer may lawfully pay a school warrant drawn on the teachers' fund by a common school district in favor of the consolidated high school district, for the payment of tuition due said high school district, if no part of the minimum guarantee is used for such purpose.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RFT:ml

NARCOTICS: Probate court, upon adjudication of veteran
PROBATE COURT: as narcotic addict, may commit said veteran
VETERANS: to United States Public Health Service for
required care and treatment.

July 18, 1951

7/18/51



Mr. George M. Reed
State Service Officer
P. O. Drawer 147
Jefferson City, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department, which, in part, reads:

"This office was created by an Act of the General Assembly to assist veterans and their dependents in obtaining benefits to which they may be due from the Federal Government. Among these benefits is hospitalization for all types of diseases, illnesses and injuries.

"Apparently there is an upswing in the use of narcotics by Missouri veterans which is posing a rather large problem for this office, since very few hospitals are equipped to treat and assist narcotic addicts; therefore, we respectfully request an opinion on the following:

"Under Chapter 459, Uniform Veterans' Guardianship Law, Paragraph 459.170, Commitment to Veterans Administration or other United States agency, we impose the following question:

"Does the Probate Judge in a County of Missouri have the authority to commit a veteran who is a resident of the State of Missouri and who has been proven to be a narcotic addict to the United States narcotic hospitals at Lexington, Kentucky,

Mr. George M. Reed

and Fort Worth, Texas, as he has authority to commit a veteran who is a resident of the State of Missouri and who has been proven of unsound mind to a Veterans Administration facility outside the State of Missouri?"

Under Section 459.170, RSMo 1949, which is a part of the Uniform Veterans' Guardianship Law, a person who is found to be eligible and who is of unsound mind or otherwise in need of confinement in a hospital or institution for proper care may be committed by a court to the Veterans Administration or other agency of the United States government for such care. Thus that section, in part, provides:

"Whenever, in any proceeding under the laws of this state for the commitment of a person alleged to be of unsound mind or otherwise in need of confinement in a hospital or other institution for his proper care, it is determined after such adjudication of the status of such person as may be required by law that commitment to a hospital for mental disease or other institution is necessary for safe-keeping or treatment and it appears that such person is eligible for care or treatment by the Veterans Administration or other agency of the United States government, the court, upon receipt of a certificate from the Veterans Administration or such other agency showing that facilities are available and that such person is eligible for care or treatment therein, may commit such person to said Veterans Administration or other agency. The person whose commitment is sought shall be personally served with notice of the pending commitment proceeding in the manner as provided by the law of this state; and nothing in this chapter shall affect his right to appear and be heard in the proceedings. Upon commitment, such person, when admitted to any facility operated by any such agency within or without this state shall be subject to the rules and regulations of the Veterans Administration or other agency. * * *"
(Emphasis ours.)

However, the above statute requires that a proper proceeding under the laws of the State of Missouri must first be had before the court in which such proceeding is instituted can order the commitment of a particular person.

Mr. George M. Reed

Unquestionably, a narcotic addict requires the necessary treatment and, in most cases, confinement in an institution where such treatment can be properly administered. Such has been recognized by the Legislature of the State of Missouri, which has provided that "dope fiends" and "addicts" shall be subject to confinement in state hospitals for the cure of their particular drug habit. The law further provides for the necessary proceeding in order to commit such persons to a hospital and vests the probate court of any county in this state with authority, after the necessary proceeding has been had, to order such commitment. Thus Section 202.380, RSMo 1949, provides:

"Any such dope fiend or addict, upon written information charging him or her so to be, signed by any resident of the county of such person's residence and filed with the probate court thereof, shall be cited by said court upon five days' notice served in the same manner as personal summons is required to be served in civil actions, to show cause why he or she shall not be adjudged to be confined for the cure of such habit. Upon the return day of such notice said probate court shall, without the aid of a jury, inquire into and shall declare of record its finding whether or not the person so charged be in fact a dope fiend or addict in the use of any such drug or drugs, and if it so finds such person to be as charged, said court shall further proceed as in section 202.370 in the matter of the appointment of a curator."

Section 202.390, RSMo 1949, in part, provides:

"Whenever the probate court of any county in this state shall find upon citation and trial, or upon confession as the case may be, that any person so coming under its jurisdiction as herein provided, as a habitual user of any such drug or drugs, it shall at once issue its certificate in duplicate to that effect under the hand and seal of said court directed to any hospital for insane patients in the state of Missouri, to be selected by said court, and shall deliver the same to the sheriff of the county, who shall thereupon and by authority thereof deliver such person into the custody of the

Mr. George M. Reed

superintendent of such hospital, leaving one copy of such certificate with such superintendent as his authority for such custody, and making return to said court upon the other copy. * * *"

It is therefore our thought that when a proceeding such as outlined in the above sections is had in the probate court of any county in the state for a resident of the state who is then adjudicated to be a habitual user of drugs or narcotic addict requiring hospitalization, said court would have authority under the provisions of Section 459.170, supra, to commit such person to an agency of the United States government having the necessary facilities for care and treatment, providing, of course, that said person is in other respects eligible. Such would constitute a compliance with said Section 459.170 which first requires that a proceeding be held under the laws of the State of Missouri for the commitment of a person alleged to be in need of confinement in the hospital or other institution for his proper care.

At our request for additional information you have stated that the agency of the United States government which has the management, supervision and control of the narcotic hospitals mentioned in your letter is the United States Public Health Service. In other words, it is our understanding that the United States Public Health Service operates said narcotic hospitals in the same manner as the Veterans Administration operates the various veteran's hospitals throughout the country. Such being the case, we believe that the United States Public Health Service would be included within the term "other agency of the United States government," as used in Section 459.170, supra, and that the probate court of any county within the state, after the required proceeding as above set out had been complied with, could commit a person adjudicated a narcotic addict, who was in need of necessary treatment and whose eligibility had been established, to the United States Public Health Service in the same manner as the court could commit a person of unsound mind to the Veterans Administration. It would then be within the authority of the United States Public Health Service to admit a person requiring treatment to a narcotic hospital wherein the facilities were available.

CONCLUSION

It is therefore the opinion of this department that the probate court of any county within the State of Missouri, after

Mr. George M. Reed

a proceeding had been had as required by law, could commit a person adjudicated a narcotic addict, who required treatment, to the United States Public Health Service, provided that such person was in other respects found eligible to receive the necessary care and treatment from said federal agency.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RFT:ml

ABSENTEE BALLOTS: An absentee ballot may be cast in the regular election held for the purpose of electing a county superintendent of schools.

March 21, 1951

3-22-51

Honorable James T. Riley, Prosecuting Attorney
Cole County
Courthouse
Jefferson City, Missouri

75
FILED

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

"I will appreciate receiving your ruling on the following question:

"Do the statutes providing for the voting of absentee ballots apply to the election of the County Superintendent of Schools?

"As you know this election is to be held on April 3rd, for that reason I would like to have an early expression from your office."

In regard to the above, we would first direct attention to Section 167.010, RSMo 1949, which states, in part:

"The qualified voters of each and every county in this state shall elect a county superintendent of public schools at the annual district school meeting held on the first Tuesday in April, 1943, and every four years thereafter. * * *"

We would next direct attention to Section 112.010, RSMo 1949, which states:

"Any person being a duly qualified elector of the state of Missouri, other than a person in military or naval service, who expects to be absent from the county in which he is a qualified elector on the day of holding any special, general or primary

Honorable James T. Riley

election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, or any person who through illness or physical disability expects to be prevented from personally going to the polls to vote on election day, may vote at such election as herein provided."

It is clear that the election to elect a county superintendent of schools is an election for a county office.

The following Sections, 112.020, 112.030, 112.040, and 112.050, state the method by which a person who is entitled by Section 112.010 quoted above, to cast an absentee vote, may do so.

It would seem clear from the above that if the election at which a county superintendent of schools is elected is either a "special", a "general", or a "primary" election, that absentee ballots could be cast in such an election. In this regard, we will therefore first consider whether such an election could properly be termed a "general" election.

Chapter 1, Section 1.020, paragraph 3, RSMo 1949, states that:

"'General Election' means the election required to be held on the Tuesday succeeding the first Monday of November, biennially;"

The same definition of "general election" is given in the statutes of 1939, 1929 and 1919. It may be added that in the statutes of 1919, the section giving this definition is 7058.

On December 6, 1928, the Missouri Supreme Court, in Banc, rendered its decision in the case of Dysart vs. City of St. Louis et al, 11 S.W. 2d, 1045. In that case the court was concerned, in part with defining general, special, and primary elections. In the course of that opinion the court said, in part, (l.c. 1052):

"But the definition of 'general election' is settled by an amendment to the Constitution

Honorable James T. Riley

adopted in 1920 (see laws 1921, page 703), by which Section 12 of Article 10 was repealed, and another section by the same number adopted. It provides:

"No county, city, town, township, school district or other political * * * subdivision of the state shall * * * become indebted,' except by a two-thirds vote at an election held for that purpose; and, 'such proposition may be submitted at any election, general or special.'

"It follows that any local election, city, county, etc., may be either general or special, and this wipes out the definition of 'general election' in section 7058, or limits the implied distinction to state elections.

"It necessarily means that a special election is one called for a special purpose, not one fixed by law to occur at regular intervals. * * *"

Further on in the opinion, the court cites, with approval, the case of State ex rel. Fish v. Howell, 110 Pac. 388, and quotes the following portion of that opinion:

"It is not necessarily the time or manner of holding an election to fill a vacancy that makes it a special election, but the fact that it is held at a time other than the time fixed by law to elect an officer for the regular or defined term."

We are unable to find that the above holdings have been changed or modified by subsequent Missouri Appellate Court decisions. In this connection, we will also direct attention to the case of People ex rel. Elder v. Quilici, 33 N.E. 2d, 492, which states, in part, that a "general election" means the selection of officers to serve after the terms of former officers; that the case of Lively v. Brown, 202 S.W. 2d, 371, holds that a "general election" is held to select an officer after the expiration of a former officer's full term, whereas "special election" is held to fill a vacancy on a day other than a prescribed regular election day and before the time of a general election for a full term, or to vote upon some special measure;

Honorable James T. Riley

that the case of Grant v. Payne, 107 Pac. 2d 307, also holds that a "general election" is for the purpose of selecting an officer after the expiration of the full term of a former officer. Numerous other cases could be cited which have the same holding in this respect.

It will be observed that in the portion of the Dysart opinion quoted above, the Supreme Court of Missouri greatly amplifies the definition of "general election" given in Section 7508, RSMo 1919 (now Section 1.020, RSMo 1949), and that the amplification includes county elections, the dates of which are fixed by law.

We are familiar, as of course the Missouri Supreme Court was familiar at the time it rendered the Dysart opinion, with the case of State of Missouri, Respondent, v. Henry Searcy, Appellant, 39 Mo. App. 393. This case, in which the opinion was rendered by the St. Louis Court of Appeals on February 18, 1890, specifically holds (l.c. 405) that the general school election required by law to be held in all counties of the state on the first Tuesday in April, is not a "general election". The court bases this conclusion upon the definition of "general election" given in Section 3126, R.S.Mo. 1879, which, as we stated above, is the same definition given in Section 1.020, RSMo 1949, paragraph 3, which definition was given by us above.

However, in the Dysart opinion, the Missouri Supreme Court does not mention the Searcy case, which leads us to believe that the Missouri Supreme Court, at the time (1928) of writing the Dysart opinion, did not consider that the Searcy case advanced a tenable theory of law, and that therefore it was the intention of the court, in the Dysart case, to overrule the Searcy case by implication.

In view of the Dysart case, cited, in part, above, and of the other cases also cited, it is the opinion of this department that the county election held every four years at a time fixed by law, for the purpose of electing a county superintendent of schools, is a "general election" within the meaning of Section 112.010, RSMo 1949, et seq., and that, therefore, an absentee ballot can be cast in such an election, subject to the qualifications set forth in said Section 112.010, et seq.

CONCLUSION

An absentee ballot may be cast in the regular election held for the purpose of electing a county superintendent of schools.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:



11-23-51

EXAMINATION:
BOARD OF PHARMACY:
EXAMINATION FOR PHARMACIST:
RECIPROCITY:
ELIGIBILITY FOR REGISTRY:
BY RECIPROCITY:

(1) Applicant must be a graduate of a school of pharmacy to be eligible for registry by examination as a pharmacist in Missouri. (2) An applicant eligible for registry by reciprocity in Missouri if state from which he seeks reciprocity accords similar recognition to licentiates of this state, if he was registered or licensed by examination in such other state or foreign country; if the standard of competency in such other state or foreign country is not lower than that required in this state; and if the applicant for such license shall present satisfactory evidence of qualifications equal to those required from the licentiates in this state.

November 23, 1951

FILED

75

Mr. Charles W. Riley
Secretary, Board of Pharmacy
State of Missouri
254 Wilhoit Building
Springfield, Missouri

Dear Sir:

Your recent request for an opinion of this office has been referred to me, the pertinent part of your letter is as follows:

"(1) Is an applicant eligible for registry by examination as a pharmacist in Missouri if such applicant is not a graduate of an approved school of pharmacy?

"(2) Is an applicant eligible for registry by reciprocity in Missouri if such applicant is not a graduate of an approved school of pharmacy but is registered by examination in New Mexico, Colorado, and Nevada since the year 1938."

Section 338.030, RSMo 1949, we believe, contains the answer to your first question and said statute reads as follows:

"An applicant for examination shall be twenty-one years of age and in addition shall have attended high school for four years or its equivalent, have had one year practical experience in a retail drug store under the supervision of a registered pharmacist, and shall be a graduate of a school or college of pharmacy whose requirements for graduation are satisfactory to and approved by the board of pharmacy." (Underscoring ours.)

Mr. Charles W. Riley

We believe, without question, that the above underlined section of the statute makes it mandatory that an applicant, to be eligible for the registry as a pharmacist in Missouri must be a graduate of a school or college of pharmacy whose requirements for graduation are satisfactory to and approved by your board.

Section 338.040, RSMo 1949, we believe, contains the answer to your second question. Said section reads:

"The board of pharmacy may issue licenses to practice as pharmacists in this state without examination to such persons as have been legally registered or licensed as pharmacists in other states or foreign countries; provided, that the applicant for such license shall present satisfactory evidence of qualifications equal to those required from licentiates in this state, and that he was registered or licensed by examination in such other state or foreign country, and that the standard of competence required in such other state or foreign country is not lower than that required in this state; and also provided, that the board is satisfied that such other state or foreign country accords similar recognition to the licentiates of this state. Applicants for license under this section shall, with their application, forward to the secretary of the board of pharmacy the sum of fifteen dollars as a fee for such license."
(Underscoring ours.)

It is our opinion that the applicant, inquired about in your second question above, is eligible for registry by reciprocity in Missouri if he has been registered heretofore by examination in New Mexico, Colorado and Nevada since the year 1938, and if he can present satisfactory evidence of qualifications equal to those required from licentiates in this state, that the standard of competence required in any of the other states, is not lower than that required in this state, and that such other state or foreign country accords similar recognition to the licentiates of this state.

Therefore, the only thing that would preclude your granting a license to this applicant is the fact that one or more of the four qualifications for a license by reciprocity, as set out in Section 338.040, RSMo 1949, is missing from his application.

Mr. Charles W. Riley

CONCLUSION

It is therefore the opinion of this department:


(1) That an applicant is not eligible for registry by examination as a pharmacist in Missouri unless he shall be a graduate of a school or college of pharmacy whose requirements of graduation are satisfactory to and approved by the Board of Pharmacy.

(2) That the applicant about whom inquiry is made in your second question above, is eligible for registry by reciprocity in Missouri if either of the states of New Mexico, Colorado or Nevada accord similar recognition to the licentiates of this state; if he was registered or licensed by examination in such other state or foreign country; if the standard of competency in such other state or foreign country is not lower than that required in this state; and if the applicant for such license shall present satisfactory evidence of qualifications equal to those required from the licentiates in this state.

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

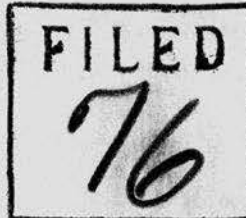
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MAGISTRATE COURTS: The sheriff of a fourth-class county is under
SUMMONING JURORS: duty to summon jurors when ordered to do so by
the magistrate.

September 17, 1951

9-17-51

Mr. Allen Rolston
Prosecuting Attorney
Schuyler County
Lancaster, Missouri



Dear Mr. Rolston:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"Please let me have your opinion as to whether or not the sheriff of a fourth class county has the right or duty to summons jury in the magistrate court, and if so, what fees and mileage would be allowed."

Magistrate courts were established in Missouri by mandate of the new Constitution of 1945. The statute governing the selection of jurors for magistrate courts was enacted by the legislature in 1947 and is now contained in Chapter 499, RSMo 1949.

The regular method for selecting such juror calls for twenty-four names to be taken from a list prepared by the board of jury commissioners, and Section 499.060 provides that the persons thus selected shall be summoned by registered mail.

Section 499.070, RSMo 1949, is as follows:

"If any juror summoned is excused or disqualified or if the summons mailed him cannot be delivered, the magistrate may order the sheriff or other officer authorized by law to summons such number of jurors as may be required either for the regular panel or for any case and such officer shall summons such jurors in the same manner as is required in summoning grand or petit juries."

Mr. Allen Rolston

Under this section the sheriff may be called upon to summon additional jurors when needed for service in a magistrate court. When so ordered by the magistrate, the sheriff is under duty to "summons such jurors in the same manner as is required in summoning grand or petit juries."

Section 499.150, RSMo 1949, is as follows:

"In any county now or hereafter having a population of less than seventy thousand inhabitants, the magistrate or magistrates may, by order of record, direct that jurors be selected by issuing a summons to the sheriff or other officer ordering him to summons the appropriate number of jurors. In such event, each juror summoned shall receive one dollar per day for every day he may actually serve as such, and five cents for every mile he may necessarily travel going from his place of residence to the place where the trial is held, and such fees and expenses shall be taxed as costs in the particular case tried. In the event that the magistrate or magistrates make the order herein provided for, the order shall have the effect of suspending the provisions of sections 499.010 to 499.160 in the selection of the general county panel and the selection of jurors thereunder; and such provisions shall remain suspended until such order is rescinded."

The magistrate is herein authorized to suspend the employment of jurors selected by the board of jury commissioners by ordering the sheriff to summon a sufficient number of jurors to serve in the court. The sheriff when so ordered, is under duty to carry out the directions of the magistrate.

The fees and mileage allowed a sheriff for summoning jurors to serve in a magistrate court are determined by the general laws pertaining to sheriffs as incorporated in Sections 57.280, 57.290 and 57.300, RSMo 1949.

CONCLUSION

It is the opinion of this office that the sheriff of a fourth-

Mr. Allen Rolston


class county is under duty to summon jurors for service in the magistrate court when ordered to do so by the magistrate under either Section 499.070 or Section 499.150, RSMo 1949.

It is also our opinion that the sheriff for summoning such jurors should be allowed the usual fees and mileage as provided in Sections 57.280, 57.290 and 57.300, RSMo 1949.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

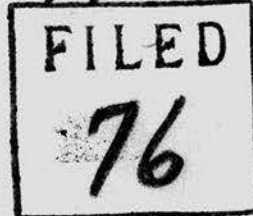
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SPECIAL ELECTIONS:
SECTION 262.500, RSMo 1949:
DUTY OF COUNTY COURT:

County court required to file and consider petition requesting special election authorized by Section 262.500. Even though petition is signed by statutory number of qualified voters, court's duty is to refuse to call election ~~since~~ county has already reached maximum tax rate for county purposes fixed by Art. X, Sec. 11(b), Const. of 1945, and court is prohibited from calling the election under Section 262.500, supra.

October 19, 1951

Honorable Lawson Romjue
Prosecuting Attorney of
Macon County
Macon, Missouri



Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department which reads as follows:

"The County Court of Macon County has directed me to request your opinion under the provisions of Sections 262.290--262.540 and especially 262.500 Revised Statutes of Missouri, 1949, upon the questions hereinafter set out.

"In so far as the facts appear to be pertinent the full constitutional limit has been levied in Macon County for county purposes for the last five years and probably longer and it will undoubtedly be necessary to continue the levy in the constitutional limit.

"A copy of the petition which is being circulated is enclosed.

"Question: 1. Under the statutory provisions above is the County Court required to accept a petition in the form enclosed bearing the

Honorable Romjue

required number of qualified signatures. 2.
If the answer to question one is in the affirmative, is the County Court required to call the election contemplated by the Statutes."

Reference is made in your letter to Sections 262.290, 262.540, and especially 262.500, RSMo 1949, but since the latter section is the one which applies to the facts and the matter of inquiry, we believe it sufficient to quote a part only of that section, as follows:

"In all counties of this state in which the constitutional limit is not levied for county purposes, it shall be the duty of the county court, upon the filing of a petition signed by not less than three hundred resident taxpayers and qualified electors of such county, to call an election to submit to the qualified voters thereof, a special levy of not more than two mills on the dollar valuation, which levy, together with all other levies for county purposes, shall not exceed the constitutional limit of levy for the county affected, for the purpose of encouraging, promoting and improving the livestock, poultry, agricultural, horticultural, mechanical fabrics and fine arts, products and articles of domestic industry, and the exhibition of such stock, poultry articles and commodities, at the district or county fair held in such county."

We understand question one, to inquire if it is the duty of your county court, when presented with a petition in the enclosed form, and containing the required number of signatures provided by the statutes referred to above, to file the petition and give further consideration as to whether or not it will call the special election requested in said petition.

The petition is addressed to the Honorable County Court of Macon County, Missouri, and the body of said petition reads as follows:

"We, the undersigned resident taxpayers and qualified electors of Macon County, Missouri, hereby petition your Honorable Court to call an election to submit to the qualified voters of Macon County, Missouri, a proposition authorizing the special levy of a tax of not more than

two mills on the dollar valuation on all property subject to the taxing powers of your court for the purpose of encouraging, promoting, and improving the livestock, poultry, agricultural, mechanical fabrics and fine arts, products and articles of domestic industry, and the exhibition of such stock, poultry, articles and commodities, at the county fairs held in Macon County, Missouri, as provided for in Section 262.500, Revised Statutes of Missouri, 1949."

The petition is informally drawn under section 262.500, and upon a comparison of it with the provisions of said section it appears that the language of the petition is sufficiently clear to inform the court of the facts upon which the request for a special election to be called by the court is based and that it states a prima facie case for the consideration of the court. The statute places no limitation upon the filing of petitions under such circumstances, and it is our thought that the court must file the petition and give due consideration to the request made therein, therefore our answer to question one, is in the affirmative.

Question two, inquires that if the answer to question one is in the affirmative, is the county court required to call the election contemplated by the statutes. In other words, upon the filing of the petition is it the mandatory duty of the county court to call the election, or is the court allowed any discretion in the matter.

It appears that the duty of the court is to determine first, whether or not the petition is sufficient under the statute, and second, whether the allegations of the petition are supported by sufficient evidence to justify the court in calling the election. Such duties are not altogether ministerial in character, but require the discretion of the court in the matter.

As authority for our contention, we cite the case of State of Missouri ex rel. v. Judges of County Court of Taney County, 240 Mo. App. 99. In this case mandamus was requested to compel the county court to submit the question of the removal of a county seat to the voters in a special election. The court had refused to call the election and it was alleged that the court had acted arbitrarily in finding that the petition for submission of the proposition did not contain a sufficient number of names.

Honorable Romjue

At l. c. 104, 105, and 106, the court said:

"Section 13732 provides that whenever one-fourth of the voters of any county shall petition the county court for a removal of the seat of justice of such county to any other place, the court shall make an order directing that the proposition to remove said seat of justice, named in the petition, be submitted to the voters at the next general election and shall give proper notice thereof as required by the statute. The first step, before the county court is authorized to call the election, is the filing of a proper petition, that is, one that is signed by more than one-fourth of the voters of the county. It is only upon the filing of this proper petition that the county court can legally make the order submitting the matter to the voters at the general election. The question is, whose duty is it to pass upon the sufficiency of the petition? Certainly, it must be that of the county court. They must first ascertain whether they have the right to make the order submitting the proposition. The question of whether or not a proper petition has been presented to them is a matter of which they have absolute and sole jurisdiction. In passing upon the question they must exercise their discretion. State ex rel. Heller vs. Thornhill, 174 Mo. App. 469, 160 S. W. 558. State ex rel. Bismark Grill vs. Kiernan, 238 Mo. App. 507, 181 S.W. (2d) 798. The order made by it, and set out in relators' petition, in haec verba, indicates that it has done so. It permitted the filing of the petition. It was on file for several months. The case was called up for hearing, the petition was read, respondents became familiar with the provisions. The record recites that it heard evidence thereon and was fully advised in the premises and then it found that 'the said petition did not obtain (contain) sufficient number of names.' The petition was therefore rejected. No order was made specifically refusing to place the proposition on

the ballots.

"In the petition of relators and in the writ, it is alleged that respondents acted arbitrarily, unreasonably, and capriciously. This allegation is a mere conclusion. * * *

"Here, there is no such supporting statement of facts. On the contrary, the order of the county court is pleaded, which, instead of showing arbitrary and capricious action on the part of the court, shows that they followed an orderly and legal procedure.

"What relators really ask this court to do is to direct the county court of Taney County to make an order submitting the question to the voters, although the jurisdictional petition has been found insufficient. If relators' prayer should be construed to mean that we are asked to direct the county court to make an order holding the petition sufficient, we have no such authority because it is universally held that while we may by mandamus compel an inferior tribunal to act judicially or to perform a ministerial act, that we have no authority to control its decision on a discretionary matter or tell it how a question should be decided, or require it to decide such question in a particular way. State ex rel. Brown vs. Stiff, 104 Mo. App. 685, 78 S. W. 675. State ex rel. Folkers vs. Welsch, 235 Mo. App. 15, 124 S.W. (2) 636. State ex rel. Rice vs. Thompson et al. (Mo. App.); 203 S. W. (2d) 881. Baker vs. Tener (Mo. App.), 112 S. W. (2d) 351. State ex rel. Hutton v. Scott Co. Ct. (Mo.), 197 S. W. 347. State ex rel. Howe vs. Hughes, 123 S. W. (2d) 105, 343 Mo. 827."

In the event the court finds the allegations of the petition and the evidence offered in support thereof sufficient under the provisions of section 262.500, supra, the court has no further discretion in the matter but must call the special election as requested. A failure of the court to perform this duty after having made such finding is legally inexcusable, and such court might be forced to do so by mandamus. However, in such instance the court has power to call said election only when all the statutory conditions have been met.

Honorable Romjue

In this connection it appears that a question may arise as to what finding the court must make in regard to the facts, before it is authorized to call the special election.

Section 262.500, supra, begins with the words "in all counties of this state in which the constitutional limit is not levied for county purposes, it shall be the duty of the county court * * *."

The constitutional limit referred to is that found in the Constitution of Missouri, 1945, Article X, Section 11(b), which reads in part as follows:

"Any tax imposed upon such property by municipalities, counties, or school districts, for their respective purposes, shall not exceed the following annual rates

* * * * *

"For county purposes - thirty-five cents on the hundred dollars assessed valuation in counties having three hundred million, or more, assessed valuation, and fifty cents on the hundred dollars assessed valuation in all other counties."

The first requirement then of the statute (which only applies to the counties referred to) is that the court must find that the constitutional limit of the tax rate for county purposes has not been reached.

Upon referring to the Roster of State, District and County Officers of Missouri, for 1951 and 1952, as compiled and distributed by the Honorable Walter H. Toberman, Secretary of State of Missouri, it appears that Macon County had an assessed valuation for 1951, of \$22,738,979.

The opinion request states that the constitutional tax limit for the past five years in Macon County has been reached, and that it will undoubtedly be necessary to continue this rate for some time in the future. Incidentally, the tax rate for county purposes under the above constitutional limit is fifty cents on the one-hundred dollars assessed valuation, for Macon County.

The second requirement of the statute is that a petition must be presented to the court requesting them to call the election and that such petition must contain not less than three hundred signatures of resident taxpayers and qualified voters of the county.

Honorable Romjue

The opinion intimates that the petition in the instant case contains the required number of signers, and it appears that the petition complies with the statutory requirements in this particular.

A third requirement of the statute is that in the event the court finds the petition sufficient, and does call the special election as requested, it shall specify the amount of tax levy found to be necessary, (not exceeding two mills on the dollar valuation) which levy shall be set out in the proposition submitted to the voters of the county, and that such levy, together with all other levies for county purposes shall not exceed the constitutional limit of levy for county purposes.

Although the petition presented to the county court of Macon County, has been signed by the statutory number of qualified electors of the county, as provided by section 262.500, supra, it is our thought that said county court is not required to call the special election requested by the petitioners, but that it is the duty of the court to refuse to call the election and dismiss the petition. As stated above a county court has the power under section 262.500, to call an election of the nature therein specified, only when all the conditions of the statute have been met. In view of these circumstances, the county court lacks the power and cannot legally call the special election as requested.

CONCLUSION

It is the opinion of this department that when a petition drawn under Section 262.500, RSMo 1949, and signed by three hundred resident taxpayers and qualified electors of Macon County, Missouri, requesting the county court of said county to call a special election to submit to the qualified voters of Macon County, the proposition authorizing a special tax levy of not more than two mills on the dollar valuation for the purposes of encouraging, promoting, and improving livestock, poultry, agricultural, mechanical fabrics and fine arts, products and articles of domestic industry, and exhibits of such stock, poultry, articles and commodities at county fairs held in Macon County, as provided by said section, is presented to the county court of such county, it shall be the duty of the court to file said petition and give due consideration to the request made therein, and that thereafter it shall be the duty of the court to refuse to call said election and to dismiss the petition if the constitutional limit of the levy of taxes for county purposes as


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provided by Article X, Section 11(b), Constitution of Missouri,
1945, has been levied in Macon County.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

PNC:hr

TAXATION: Election to increase tax rate for purposes of
MUNICIPALITIES: increasing wages of police and fire departments
is an election to increase rate for general
municipal purposes and not for public health
purposes. Constitutional limitations of 2/3
majority and four-year increase limitations
therefor applies.

April 19, 1951

4-24-51

Honorable Wm. O. Sawyers
Senator, 34th District
Missouri Senate
Jefferson City, Missouri.



Dear Sir:

We are in receipt of your recent letter requesting an official opinion of this department, which letter reads in part as follows:

"The Police Department and Fire Department of St. Joseph, Missouri, a city of the first class, desire to avoid any constitutional or statutory necessity of promoting another rate increase election establishing for them supplemental money for livable wages every four years, as was done in 1946 and also in 1950 general city elections. The personnel of these indispensable city departments are seeking a legal method of fixing these periodic salary increases at the rate voted at an election, so that such rate once voted will be fixed continuously and earmarked solely for Police Department and Fire Department salaries, fixed and to continue until such time as the people vote to abolish, decrease or increase such fixed and earmarked rate.

* * * * *

"St. Joseph, Missouri, a city of the first class, voted by two-thirds majority vote at a general election of April 17, 1950, to increase fifteen cents on the one hundred dollar valuation an additional levy for general municipal purposes, specifying by ordinance that if the people

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vote the increase the money would be used to supplement salaries of the Police Department, Fire Department and City Officials. The people voted the increase. Since the election the funds from this fifteen cent rate are used for the three purposes specified by the city ordinance, and no other purposes. The fifteen cent rate is within the thirty cent maximum limitation of both Sections 93.085 and 93.090, Supra.

"Question: Could the election stated in the above paragraph providing extra money for the specified three purposes, be legally considered in full compliance with the provisions of Section 93.090 RSMo 1949, and thereby preclude the necessity of another election in 1954 to supplement money payable to the personnel of the Police and Fire Department as wages.

"Question: If your answer to the above question is 'no', then I ask, would it be legal under the Missouri Constitution Article 10, Section 11(c) and Section 93.090 RSMo 1949, for an election to be held in 1954 general election to increase the rate within the thirty cent maximum limitation, for public health purposes, as that language is therein used, with the electors on their ballot voting that the sole and only use of the funds, if the rate be voted by a majority vote, would be to earmark such funds for supplemental wages to the personnel of the Police Department and the Fire Department, such rate to continue until such time as the electors at a subsequent election by majority vote decide to abate, increase or decrease such rate."

Section 11(b), Article X, Constitution of Missouri, 1945, provides for a maximum annual rate of taxation which may be

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imposed by municipalities, which maximum rate is "one dollar on the hundred dollars assessed valuation."

Section 11(c), Article X, Constitution of Missouri, 1945, as amended on November 7, 1950, provides for an increase of the tax rate by popular vote as follows:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; * * * provided that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds, and museum purposes."

The City of St. Joseph, Missouri is a city of the first class. It is therefore governed by Section 73.110(3), RSMo 1949, which provides that the mayor and common council may "levy and collect a general tax of not exceeding one per cent for each fiscal year."

Under the constitutional authority of Section 11(c), supra, the legislature has also provided by Section 93.085, RSMo 1949, that:

"The rate and limitation fixed and prescribed in subdivision (3) of section 73.110, RSMo 1949, is the maximum rate a common council of any city of the first class shall have the power to levy for general municipal purposes; provided, however, that the rate and limitation

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fixed and prescribed for in said subdivision (3) for general municipal purposes may, in addition to the aforesaid rate and purposes of increase which may be voted by city ordinance, be further increased for general municipal purposes for a period not to exceed four years at any one time when such rate and purpose of increase are submitted to a vote of the qualified electors within such cities, and two-thirds of the qualified electors voting thereon shall vote therefor, but such increase so voted shall be limited to a maximum rate of taxation not to exceed thirty cents on the one hundred dollars assessed valuation upon all property subject to their taxing powers."

The legislature has also provided for a further increase in the rate of taxation in such cities for library, hospital, public health, recreation grounds, and museum purposes by section 93.090, RSMo 1949, which section reads in part as follows:

"1. In addition to the levies as provided for in section 93.085 all cities of the first class are hereby authorized to levy annually not to exceed thirty cents in the aggregate on the one hundred dollars assessed valuation upon all property subject to its taxing powers for any one or more of the following purposes: Library, hospital, public health, recreation grounds and museum purposes, when such rate and purpose of increase are submitted to a vote of the qualified electors within such cities and a majority voting thereon shall vote therefor."

As we understand the situation, it has been necessary in the City of St. Joseph to hold an election in accordance with the provisions of Section 93.085, supra, in order to provide for an increase in the wages of the police and fire departments of the City of St. Joseph. The instant inquiry is prompted by a desire to authorize such increase by utilizing the provisions

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of Section 93.090, supra. Thereby, a simple, rather than a two-thirds, majority at the election would be required to obtain the increased rate and such authorization, once obtained by such election, would not necessarily have to be voted on every four years.

The question, therefore, is whether or not an election to increase the rate of taxation for the purpose of increasing the wages of the members of the police and fire departments is an election to increase the taxation rate for general municipal purposes or whether such election can be considered an election to increase the rate for one of the five special purposes enumerated in Section 11(c) and 93.090, supra.

The election under consideration can undoubtedly be considered to be for general municipal purposes. The five special purposes for which the rate of taxation may be increased under authority and in accordance with Section 93.090, are "library, hospital, public health, recreation grounds, and museum purposes." In the present instance the only purpose under which the increase in the wages of the members of the police and fire departments might possibly fall is for public health purposes. The Supreme Court of Missouri has defined public health in the case of *State ex rel. v. Becker*, 233 S.W. 641, 1.c. 649, 289 Mo. 660, as follows:

"* * * By the 'public health' is meant the wholesome sanitary condition of the community at large. 1 Bl. Com. 122; Anderson's Law Dict."

Regarding the purpose of a police department, we find the following in *State v. Edwards*, 106 Pacific 703, 1.c. 704, 40 Mont. 313:

"* * * The police force of a city is the body of men appointed to preserve the peace and good order of the city. * * *"

and in *City of Phoenix v. Yates*, 208 Pacific (2d) 1147, 1.c. 1151, 69 Ariz. 68, firemen were defined as follows:

"* * * In 36 C.J.S., page 809, firemen are defined 'those whose duty is to extinguish fires and to protect property and life therefrom. * * *'"

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The Supreme Court of the State of Missouri has stated in the case of King v. Priest, 206 S.W. (2d) 547, l.c. 555, 357 Mo. 68, that:

"In Carter v. Thompson, supra, 164 Va. 312, 180 S.E. 410, 412, the court said:
'Police and fire departments are in a class apart. Both are at times charged with the preservation of public order, and for manifold reasons they owe to the public their undivided allegiance.* * *'"

Therefore, we find that while the duties of police and fire departments may be such that they occasionally and indirectly aid and further the sanitary conditions of the community, the primary purpose and reason for their existence is the preservation of peace and public order and protection of life and property. In view of this we are of the opinion that an election to increase the rate of taxation for the purpose of increasing the wages of the members of the police and fire departments cannot be considered an election to increase the rate of taxation for public health purposes, but rather such would be an election to increase the tax rate for general municipal purposes. Such an election can only be held under authority of Section 11(c) of Article X, Constitution of Missouri, 1945, and Section 93.085, RSMo 1949, which sections plainly provide that a two-thirds majority of the qualified electors voting thereon is necessary to authorize such increase and that such increase shall be authorized for not to exceed four years.

CONCLUSION

It is therefore the opinion of this department that an election in a city of the first class to increase the rate of taxation for the purpose of increasing the wages of the members of the police and fire departments is an election to increase the rate of taxation for general municipal purposes. At such election a two-thirds majority of the qualified electors voting thereon is necessary to authorize such increase and such increase can only be authorized for not to exceed four years.


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It is further our opinion that such an election cannot be considered an election to increase the rate of taxation for public health purposes, and therefore cannot be held under the provisions of Section 93.090, RSMo 1949.

Respectfully submitted,

RICHARD H. VOSS,
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RHV:ba

SHERIFF:
WARRANT:

It is unlawful for the city policeman to make an arrest outside of the territorial limits of the city or state under a warrant directed to the sheriff.

FILED
78

December 11, 1951

12-14-51

Honorable William Orr Sawyers, Senator
Missouri State Senate
Capitol Building
Jefferson City, Missouri

Dear Senator:

Reference is made to your recent request for an official opinion of this office, which request reads as follows:

"I would appreciate your opinion in the following problem which presents itself in Buchanan County, Missouri.

"The facts are as follows: the St. Joseph Police Department frequently go to the prosecuting attorney's office and take possession of a state warrant issued by a Buchanan County magistrate and fortified with this state warrant they will leave the jurisdiction of St. Joseph, Missouri and go to other cities and other states and bring back prisoners mentioned in the warrant and deliver them to the county jail in the custody of the sheriff. The sheriff then takes the prisoner before the magistrate judge who issued the warrant and has the prisoner arraigned.

"The warrant which is used by the city policeman is directed to 'the State of Missouri to the sheriff of said county' and in the magistrate's warrant the magistrate commands the sheriff to take the said prisoner if he be found in Buchanan County, and him safely keep, and bring before the magistrate to

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answer said complaint. The warrant is directed to no other person than the sheriff, and there is no direction in the warrant to any police officer for the City of St. Joseph, Missouri.

"Please give me your opinion as to whether or not it is lawful for a St. Joseph Policeman to go out of the City of St. Joseph and out into another state and pick up a prisoner on a state warrant without the consent or authority of the sheriff of Buchanan County in executing such a state warrant as before described."

You have stated that the warrant presumably under which the arrest was made is directed to the sheriff of Buchanan County and that there is no direction in the warrant to any police officer for the City of St. Joseph. It is, under such a warrant, the duty of the sheriff to comply with the command contained therein. Although the warrant is specifically directed to the sheriff a valid arrest may be effected by a duly constituted deputy of such officer. The following is found in 6 C.J.S., Arrest, page 576:

"The sheriff to whom a warrant is addressed may act through one of his deputies, although the warrant is not in terms addressed to the deputy. * * *"

You have further stated that the city policeman making the arrest acts without the authority of the sheriff, therefore we must presume that such policeman is not a duly constituted deputy of the sheriff with authority to make such arrest.

We now turn to the authority of a city policeman to make an arrest outside of the territorial limits of the city. Such officers have no such authority in the absence of statute. This rule is stated in the case of *Rodgers v. Schroeder*, 220 Mo. App. 575, 1.c. 580, as follows:

"It is generally held, in the absence of any statute conferring the power, that municipal officers, such as marshals and policemen, have no official power to apprehend offenders beyond the boundaries of their municipalities. (*Sossamon v. Cruse*; 133 N.C. 470, 1.c. 474; *Martin v. Houck*, 141 N.C. 317; *Butolph v. Blust*,

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41 How. Pr. 481; Lawson v. Buzines (Del.), 3 Har. 416; Page v. Staples, 13 R. I. 306; Moak v. De Forrest, 5 Hill 605; Sullivan v. Wentworth, 137 Mass. 233; Ressler v. Peats, 86 Ill. 275; Krug v. Ward, 77 Ill. 603; Kindred v. Stitt, 51 Ill. 401; McCaslin v. McCord, 116 Tenn. 690; State ex rel. McNamee v. Stobie, 194 Mo. 14, 92 S.W. 191.) And statutes authorizing such officers to make arrests upon view and without process, being in derogation of liberty, are strictly construed. (Low v. Evans, 16 Ind. 486.) * * *."

The powers and duties of police officers of cities of the first class in regard to making arrest outside the territorial limits of the city is found in Section 85.060, RSMo 1949, which provides in part as follows:

"In case they shall have reason to believe that any person within said city intends to commit any breach of the peace or violation of law or order beyond the city limits, or any person charged with the commission of crime in such city, and against whom criminal process shall have been issued, such person may be arrested upon the same in any part of this state by the police force created or authorized herein; provided, however, that before the person so arrested shall be removed from the county in which said arrest is made, he shall be taken before some judge or magistrate of that county, to whom the papers authorizing such arrest shall be submitted; and the person so arrested shall not be removed from said county, but shall forthwith be discharged, unless such judge or magistrate shall approve and endorse said papers."

It is noted that such officer may make an arrest in any part of the state only under certain specified conditions. First, the offense must have been committed within the city, second, criminal process must have been issued against such offender, and third, the arrest must be made on such process.

Following the rule of construction that the expression of one thing excludes another, we are of the opinion that such officer

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may make an arrest outside the territorial limits of the city only if the above three conditions are fulfilled and in no other instance.

It is sufficient to say that under the facts you have presented that a policeman is not making an arrest upon the warrant issued by the magistrate and directed to the sheriff of Buchanan County, since such officer acts without the consent or authority of the sheriff.

In the case of State ex rel. McNamee et al. v. Stobie et al., 194 Mo. 14, the question was presented as to whether or not policemen of the City of St. Louis could make an arrest outside the city for offenses committed outside the city. The court, in its opinion, considered the proposition that such police officers were by statute state officers and the provision relating to the powers and duties of such officers which was substantially the same as Section 85.060, RSMo 1949, quoted above. The court said at l. c. 56:

"* * *It is apparent that these provisions limit the duty to arrest offenders as well as the power to do so. In the first instance they are limited in arresting offenders to the boundaries of the city of St. Louis. Secondly, it is pointed out under what circumstances they may arrest persons within the city, where there is reason to believe that such persons found within the city intend to commit any breach of the peace or violation of law or order, beyond the city limits. Thirdly, where the offense is committed in the city of St. Louis and criminal process has issued against such offender, the arrest may be made upon such process by the police force of such city in any part of the State. Under the provisions of the Scheme and Charter proposed by the thirteen freeholders, by section two, it is provided: 'The city of St. Louis, as described in the preceding section, and the residue of St. Louis county, as said county is now constituted by law, are hereby declared to be distinct and separate municipalities.' Confronted with these provisions it will certainly not be seriously urged that under the provisions of the act of 1861 the police officers of the city of St. Louis were authorized to make arrests in St. Louis county, for offenses

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committed in that county or to perform any other duty in their official capacity in said county, not expressly authorized by the act which created the offices and expressly defined the duties of the incumbents thereof. The express provision in the act defining the duties of the officers must be treated as excluding any authority to perform other functions not embraced in the act. In substance the statute expressly providing the duties to be performed by the officers under the law inaugurating the police system in the city of St. Louis, was a command of the law-making power to the officers, 'This law created the offices you are filling, and you must confine yourselves to the performance of the duties expressly designated by it.' We can conceive of no case where the familiar maxim, 'expressio unius, exclusio alterius,' can be more appropriately applied."

Under the foregoing statutes and cases, we are of the opinion that city policemen not being armed with criminal process which they may execute cannot make a lawful arrest outside of the territorial limits of the city.

CONCLUSION

Therefore, it is the opinion of this department that it is unlawful for a St. Joseph city policeman to make an arrest outside of the territorial limits of the city or state under a warrant directed to the sheriff of Buchanan County when such officers are not duly constituted deputies of such officer.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

PENAL BONDS: Personal property, as well as real estate, may be used to qualify a surety on a bail bond.

March 30, 1951

3-30-51

Mr. Jerry B. Schnapp
Prosecuting Attorney
Madison County
Fredericktown, Missouri



Dear Mr. Schnapp:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"The Honorable Circuit Judge, J. O. Swink, and myself were under the impression that before a bondsman could qualify for a Penal Bond he had to qualify on the basis of Real Estate only and that personal property could not be used for his qualifications. However, in reading the new 1949 Statutes, we cannot find in those Statutes where this is the case. Therefore, will you kindly advise as to whether or not personal property may be used for the qualification of a bondsman."

The qualifications of a surety on a penal bond are defined in Section 544.580, RSMo 1949, which is as follows:

"Sureties in recognizances in criminal cases and proceedings shall be residents of this state, and shall be worth, over and above the amount exempt from execution, and the amount of their debts and liabilities, the sum in which bail is required; and the person or persons offered as sureties may be examined on oath in regard to their qualifications as sureties, and other proof may be taken in regard to the sufficiency of the same. The officer authorized to take any such recognizance is authorized to administer all necessary oaths in that behalf."

Mr. Jerry B. Schnapp

This statute has been in force over a long period of years. It was Section 1833, R. S. Mo. 1879. Its wording at that time was exactly the same as it is now. No other law can be found to modify or change the clear meaning of this statute. It simply states that a surety must be worth, over and above exemptions and debts, the sum required in the bond. It makes no mention of any type of property, and certainly the term "worth" includes personal property as well as real estate.

Under the Laws of Missouri a corporation may be accepted as surety on a penal bond. This authority is contained in Section 379.020, RSMo 1949. The first paragraph of this statute is as follows:

"1. Any company having a paid-up capital of not less than two hundred thousand dollars, organized and incorporated under the laws of this or any other state of the United States, or any foreign government, for the purpose of transacting the business of becoming surety on bonds or obligations of persons or corporations, or of insuring the fidelity of persons holding places of public or private trust, and which has complied with all the requirements of the law regulating the admission of such companies to transact business in this state, may, on production of evidence of solvency satisfactory to the court, judge, clerk, head of department or other officer, person or persons authorized to approve the same, become and be accepted as surety on the bond, recognizance or other writing obligatory of any person or corporation in or concerning any matter in which the giving of a bond or other obligation is authorized, required or permitted by the laws of this state; and if such surety company shall furnish satisfactory evidence of its ability to provide all the security required by law, no additional security may be exacted, but other security may, in the discretion of the official authorized to approve such bond or obligation, be required; and such surety company may be released from

Mr. Jerry B. Schnapp

its liability on the same terms and conditions as are by law prescribed for the release of individuals, it being the true intent and meaning of sections 379.010 to 379.160 to enable corporations, created for that purpose, to become surety on any bond recognizance, or other writing in the nature of a bond, in the same manner that natural persons may, subject to all the rights and liabilities of such persons."

Such corporation must, of course, meet certain requirements in regard to capital stock. But no mention is made of real estate. A bonding company may be accepted on a penal bond without owning real estate. The law, therefore, permits a surety to qualify on the basis of personal assets.


CONCLUSION

It is the opinion of this office that personal property, as well as real estate, may be used to qualify a surety on a bail bond.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

BAT:ba

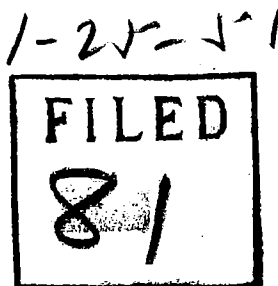
OFFICERS:

(Judge of county court holds over until
(successor is elected and qualified; no
(vacancy exists because judge-elect fails
(to qualify on account of illness; may
(qualify within reasonable time after
(physically able to perform duties.

COUNTY COURTS:

January 25, 1951

Honorable John F. Shelby
Representative, Bates County
House of Representatives
Jefferson City, Missouri



Dear Mr. Shelby:

We have your letter in which you request an opinion of this office concerning the presiding judge of your county. Your inquiry is as follows:

"In Bates County the Presiding Judge of the County Court died in June, 1950 and a successor, A. B. Cummins, was appointed by the Governor to fill the vacancy and duly qualified and has performed the duties of that office. In November, 1950, U. E. Norris was elected to this office, but since the election has been ill and in the Veterans Hospital at Wadsworth, Kansas. He has not been able to qualify, i. e., take the oath of office. In this situation I would like your opinion on the following questions:

"1. Does Mr. Cummins hold over until his successor is elected or appointed and qualified?

"2. In what time must Mr. Norris qualify to take this office?

"3. Does a vacancy now exist or will a vacancy exist at the end of thirty days from the date of the beginning of the term in the office so that the Governor may appoint a person to fill this office?

Honorable John F. Shelby

"4. In case Mr. Norris must qualify within any definite time, can he take the oath of office at the Veterans Hospital in Wadsworth, Kansas?"

Your first question may be answered by the quotation of Section 12, Article VII, Constitution of 1945, which is as follows:

"Tenure of Office. Except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

Similar provisions are found in the constitutions of many states and the courts of this and other states have uniformly construed such provisions as applicable to all state and county officers. The provision is certainly applicable to the office of presiding judge and Mr. Cummins having been duly appointed and qualified will hold over until his successor is elected.

The answer to your first question partially answers your third question. As Mr. Cummins holds over, there is no vacancy existing in the office of presiding judge. Your further inquiry as to whether a vacancy will exist at the end of thirty days from the beginning of the term of the office is doubtless prompted by the provisions of Section 476.280, RSMo 1949. This section is:

"Oath of Judges. Each judge shall, within thirty days after the receipt of his commission, and before entering upon the duties of his office, take the oath prescribed by the constitution of this state. A certificate of having taken such oath shall be endorsed upon his commission."

Honorable John F. Shelby

This section is a part of Chapter 476, Title XXXII of the Revised Statutes relative to courts. In the previous revision this chapter has been entitled "Courts of Record." The first section of the chapter, 476.010, designates the courts of record as the supreme court, the courts of appeal, the circuit court, the existing courts of common pleas, the magistrate courts and the probate courts. Under the Constitution of 1875 the county court was a court of record. Under the Constitution of 1945 county courts are provided for in Article VI which concerns local governments. In Section 7 of Article VI it is provided:

"In each county there shall be elected a county court of three members which shall manage all county business as prescribed by law"

In *Rippeto, et al. v. Thompson*, 358 Mo. 721, 216 S. W. (2d) 505, the court said (1. c. 358 Mo. 726):

"Thus, it is clear under the new Constitution (1945) county courts are no longer vested with judicial power, are not now 'courts of record' and are not what we generally know as courts of law. 'County courts are no longer courts in a juridical sense, but are ministerial bodies managing the county's business.' State ex r. Kowats v. Arnold, 356 Mo. 661, 204 S. W. (2d) 254; Bradford v. Phelps County (Mo. Sup.), 210 S. W. (2d) 996, supra."

Thus it is clear that Section 476.280 does not apply to the office of presiding judge of the county court. No other statute is found in which any time is fixed for this officer-elect to take the oath of office.

Honorable John F. Shelby

Your fourth question is fully answered by an opinion of this office, dated January 6, 1943, addressed to Honorable Llyn Bradford, Prosecuting Attorney, Phelps County, in which it is held that the person elected to the office of judge of the county court may take the oath of office before any person capable of administering oaths either within or without this state. Copy of that opinion is enclosed.

This leaves your second question, which is:

"In what time must Mr. Norris qualify to take this office?"

The Constitution provides, Section 11, Article VII, that, before taking office, all civil and military officers in this state shall take and subscribe an oath of office. Neither the Constitution nor any statute fixes a time or date by which the officer must take this office.

In 42 Am. Jur. 972, it is said:

"The time within which the officer may take the oath of office may be fixed by law, and it is usually provided that the oath shall be taken and subscribed before the officer enters upon the discharge of the duties of the office. Whether the oath may be taken after such time depends on the mandatory or directory character of the requirement."

Since we have no constitutional or statutory requirement fixing a time, it would seem that the officer may take the oath at any convenient or reasonable time although he cannot perform the duties of the office until he takes the oath.

In *Brown v. Tama County*, 122 Iowa 745, 101 American State Reports 296, the court holds that, except when prevented by sickness or inclemency of the weather, the officer is required to qualify before noon of the first Monday in January after his election, but this apparently is a provision of the statute of that state.

Honorable John F. Shelby

In *People ex rel. Benoit v. Miller*, 24 Mich. 458, 9 American Reports 131, the court held that the relator (county treasurer-elect) was entitled to compensation from the date of the beginning of his term, although he had not qualified until the termination of an election contest apparently many months after the beginning of the term. Evidently the decision is not based upon any statute excusing the officer from qualifying during the pendency of the contest but upon the ground that it was unnecessary and useless for him to qualify until he could take over the office and perform the duties thereof.

It is believed, under the facts stated by you concerning the illness of Mr. Norris, the presiding judge-elect, that he is not required to take the oath of office at any definite time, but may qualify at least within a reasonable time after he is physically able to perform the duties of the office.

CONCLUSION

It is the opinion of this office, under your statement of facts, (1) that the incumbent presiding judge holds over until his successor is elected or appointed and qualified; (2) that the presiding judge-elect may qualify in a reasonable time after he is physically able to perform the duties of his office; (3) that no vacancy now exists or will exist at the end of thirty days in the office of presiding judge of your county, and (4) that the presiding judge-elect may take the oath of office before an officer qualified to administer oaths in or out of the State of Missouri.

Respectfully submitted,

WALDO P. JOHNSON
First Assistant Attorney General

APPROVED:

J. E. TAYLOR,
Attorney General.

BANKS: A condition precedent to a national bank becoming a state bank is that it shall dissolve under the laws of the United States and proceed in accordance with provisions of Section 362.235, RSMo. 1949.

February 21, 1951

2-21-51

Honorable H. G. Shaffner
Commissioner, Division of Finance
Department of Business and Administration
Jefferson City, Missouri



Dear Sir:

The following opinion is rendered in compliance with your recent request reading, in part, as follows:

"Are there sufficient State statutes to accept by conversion a national bank as a state chartered bank? Recently the Comptroller of the Currency agreed to consent to conversions of national banks to state chartered banks in those States where there are sufficient statutes. * * *"

Section 362.235, RSMo. 1949 sets forth the requirements to be met by a bank organized under the laws of the United States if it seeks to become a state chartered bank in Missouri, said section reading as follows:

"1. Any banking corporation organized under the laws of the United States and having its place of business in this state may become an incorporated bank of this state with all the powers and subject to all the obligations and duties of banks organized under the provisions of this chapter, provided such banking corporation has authority by virtue of any law of the United States, to dissolve its organizations as a national banking corporation.

"2. A national banking corporation desiring to become such an incorporated bank of this state shall proceed in the following manner.

Honorable H. G. Shaffner

"(1) It shall take such action, in the manner prescribed or authorized by the laws of the United States, as shall make its dissolution as a national banking corporation effective at a future date certain;

"(2) Its stockholders shall proceed in all respects as is provided by law for other individuals in incorporating a bank, except that the articles of agreement may provide that instead of the capital stock being paid up in lawful money the same may be paid up by an assignment of the assets of the national banking corporation about to liquidate, such assignment to take effect at the aforesaid future date certain, and the commissioner may allow such assignment to be accepted instead of cash, if the incorporators shall have certified in the articles of agreement that the net value of such assigned assets is equal to at least the full amount of the stock of such proposed bank, and the commissioner, as the result of an examination by himself, his deputies or his examiners, is satisfied that such assets are of such value. (7947)"

A reading of the statute just quoted above clearly discloses that the principle condition precedent to the exercise of authority by a national bank to reorganize as a state chartered bank is that the national banking corporation have authority by virtue of a law of the United States to dissolve its organization as a national banking corporation. Voluntary dissolution of a national bank is authorized by Section 181, Title 12, USCA, which provides, in part, as follows:

"* * * Any association may go into liquidation and be closed by the vote of its shareholders holding two-thirds of its stock * * *."


CONCLUSION

It is the opinion of this department that any banking corporation organized under the laws of the United States and having its place of business in Missouri may, upon dissolution, reincorporate as a state chartered bank under authority contained in Section 362.235, RSMo. 1949.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

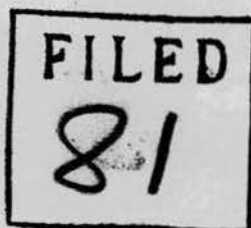
APPROVED



J. E. TAYLOR
Attorney General

JLO'M:ba

FARM TO MARKET ROADS; In the construction of a farm-to-market road the county court does not have discretion as to whether or not the road shall be built; neither the state nor county is liable for the cost of condemnation proceedings; where a farm-to-market road extends over road which has been maintained by a special road district, the special road district is not obligated to pay the expenses of condemnation and survey.



February 26, 1951

2-28-51

Honorable William E. Seay
Prosecuting Attorney of Dent County
Salem, Missouri

Dear Sir:

Your recent request for an official opinion has been assigned to me to answer.

Your opinion request is as follows:

"The county court of Dent County would like an opinion as to the following:

"(a) in the construction of a farm-to-market road, does the county court have discretion as to whether or not the road is to be built?

"(b) in the construction of a farm-to-market road does the state or the county pay the condemnation costs?

"(a) in the construction of a farm-to-market road where the farm-to-market road extends over road which is now maintained and will be maintained by the special road district must the special road district pay the attendant expenses of condemnation and survey?"

Section 230.010, RSMo 1949, provides for the appointment of a county highway commission of four members.

Section 230.020, RSMo 1949, directs the county court to appoint the members of this commission; states the terms of appointees; age and residential requirements of such appointees; and the time and manner in which the commission shall organize.

Honorable William E. Seay

Section 230.030, RSMo 1949, sets forth the powers and duties of the commission, and states:

"It shall be the duty of the county highway commission and said commission shall have the power to locate, lay out, designate, construct and maintain, subject to approval of the state highway commission, a system of county highways not exceeding in the aggregate at any given time one hundred miles in any county, by connecting by the most practical route the several centers of population in the county, in such manner as to afford a connection with such of said centers of population as are not now located on any state highway with such state highway, and so as to afford, as nearly as may be done, a connection with county highways connecting the centers of population of adjoining counties, to the end that all parts of the county shall be connected with the state highway system as now laid out and designated, and that the inhabitants of the county generally shall have and enjoy a system of highly improved farm-to-market roads. If any part of this county one hundred mile highway system has been, or shall hereafter be taken over by the state highway commission and become a state highway, then an equal amount of new mileage, to take the place thereof, may be placed in the county one hundred mile system."

Section 230.040, RSMo 1949, states:

"Before construction of any county highway located, laid out, and designated as in this chapter authorized and provided, or any money, in excess of the cost of such location and designation shall be expended thereon, it shall be the duty of county highway commission to submit such location to the state highway commission for its approval, and, upon approval of such location by the state highway commission, the county highway commission shall proceed to procure the right of way for said county highways, said right of way to be of the standard width required by the state

Honorable William E. Seay

highway commission for secondary highways, not less, however, than sixty feet wide, and secure title in fee to such right of way by deed of conveyance, or by judgment of a court of competent jurisdiction through condemnation. In all cases where condemnation is necessary, the proceedings shall be in the name of the county highway commission, and otherwise the same as now, or hereafter, provided by law for condemnation of land by the state highway commission for right of way for state highways."
(Underlining ours)

From the above it will be seen that the answer to your first question is that the county court does not have discretion as to whether or not a farm-to-market road shall be built, but that this power is vested in the county highway commission, subject to the approval of the state highway commission.

By the underlined portion of Section 230.040, RSMo 1949, quoted above, it will be seen that condemnation proceedings are brought in the name of the county highway commission. It therefore follows that neither the county nor the state would be liable to pay the cost of such proceedings because there is no statute requiring either the state or county to pay such condemnation costs.

Section 230.060, RSMo 1949, states:

"Whenever any county highway laid out and designated under the provisions of this chapter shall be over and along the route of any existing highway, it shall be the duty of the county court, or other board or commission, having jurisdiction over such highway, to convey the same to the county highway commission, who shall thereafter have control and supervision thereover, and whenever any such county highway shall be laid out and designated through any special road district, or in counties under township organization, it shall be the duty of the commissioner of such special road district, or of the treasurer of such township, to pay over to the county highway commission, such

Honorable William E. Seay

proportion of the total road revenue arising therein as the mileage of said county highway within said special road district, or township, shall bear to the total number of road mileage therein."

From the above, it will be seen that the answer to your third question is "No", since, by reason of the statute quoted above, it is made the duty of the treasurer of such township, to pay over to the county highway commission, such proportion of the total road revenue arising therein as the mileage of said county highway within said special road district, or township, shall bear to the total number of road mileage therein.


CONCLUSION

In the construction of a farm-to-market road the county court does not have discretion as to whether or not the road shall be built; neither the state nor county is liable for the cost of condemnation proceedings; where a farm-to-market road extends over road which has been maintained by a special road district, the special road district is not obligated to pay the expenses of condemnation and survey.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

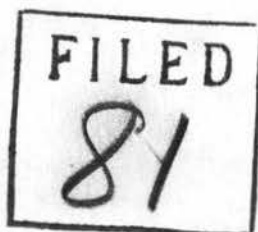
APPROVED:



J. E. TAYLOR
Attorney General

HPWab

BANKS: Bank records required to be preserved under Section 362.410, RSMo 1949, may be preserved by the methods prescribed in Section 109.120, RSMo 1949.



February 27, 1951

3-5-51

Honorable H. G. Shaffner
Commissioner, Division of Finance
Department of Business and Administration
Jefferson City, Missouri

Dear Sir:

The following opinion is rendered in reply to your recent request reading as follows:

"A number of banks are uncertain about the interpretation of Chapter 109, Public Records, Sections 109.090 through 109.170, Transcribing and Binding, R. S. Missouri, 1949, since in the Banking Laws of Missouri, 1939, we have Section 7987 relating to the preservation of books and records of banks.

"Because of the limited storage space, banks are interested in taking photo-static copies of as many of their records as possible and destroying the original record.

"Will these or any other statutes permit them to destroy the original record and keep in their stead reproduced copies?"

Section 7987, R. S. Missouri, 1939, is now found at Section 362.410, RSMo 1949, and provides:

"Every bank shall preserve all its records of final entry, including cards used under the card system and deposit tickets, for a period of at least six years from the date of making the same or from the date of the last entry thereon."

Honorable H. G. Shaffner

Section 109.120, RSMo 1949, provides:

"The head of any business, industry, profession, occupation or calling, or the head of any state, county or municipal department, commission, bureau or board may cause any or all records kept by such official, department, commission, bureau, board or business to be photographed, microphotographed, photostated or reproduced on film. Such film or reproducing material shall be of durable material and the device used to reproduce such records on such film or material shall be such as to accurately reproduce and perpetuate the original records in all details."

The last section above quoted clearly discloses that the records kept by any business may be reproduced by the methods prescribed therein. No conflict is discovered between said section and Section 362.410, RSMo 1949, requiring banks to maintain certain records for a period of six years.


CONCLUSION

It is the opinion of this department that banks which are required to preserve records for six years under the provisions of Section 362.410, RSMo 1949, may preserve the same by the methods outlined in Section 109.120, RSMo 1949.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General.

JLO'M:ba

**ELEEMOSYNARY INSTITUTIONS:
STATE SANITARIUM:**

The county of residence of a poor person in this state is the county from which such a poor person may be sent to the state sanitarium.

March 20, 1951

Honorable Gordon C. Shaffer, Jr.
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

3-21-51

FILED
81

Dear Sir:

Your letter of February 28, 1951, is further acknowledged. You have asked the Attorney General the following question:

"A man by the name of Elmer L. Smith was sentenced to serve ten years on November 13, 1946 by Judge Bridgeman (now deceased) in the Circuit Court of Andrew County. It appears that Smith's residence was in Buchanan County, Missouri.

"Mr. Francis J. Holley, the State Probation and Parole Officer in St. Joseph, received a letter from the State Board of Probation and Parole requesting that the Buchanan County Court issue an order for the admittance of Elmer L. Smith to the State Hospital at Mt. Vernon. It seems that Elmer Smith has developed a tubercular condition of such severity that the State Prison Physician has recommended Smith's transfer to the hospital in Mt. Vernon.

"Since this man was sentenced in Andrew County would you please inform this office whether or not the proper court order should be given by the County Court of Andrew County or by the County Court of Buchanan County."

It is understood from your statement in the above quoted letter that: one, prior to the sentence by the court in Andrew County, Elmer L. Smith was a resident of Buchanan County; two, that he had been a resident of Buchanan County for more than one year; three, that Smith is a poor person.

Honorable Gordon C. Shaffer, Jr.

Statutory provisions for the admission to the State Sanitarium at Mt. Vernon, Missouri, are quoted, in part as follows:

Section 199.030, RSMo 1949, (Section 9382, R.S. Mo. 1939), which due to its length is quoted, in part:

"* * * no person shall be admitted who has not been a citizen of this state for at least one year preceding the date of application. Each person desiring free treatment at said sanatorium shall apply under oath to the county court in which he or she may reside, * * * If the county court shall find that the applicant is a suitable case for admission as a free patient to the sanatorium, then the county shall cause an order to be issued for the admission of the applicant and shall immediately transmit a certified copy of such order to the superintendent of the institution. Such county orders shall upon receipt by the superintendent be entered in a record book, and the superintendent, so far as practicable, shall admit such applicants as their names appear on the record book; provided, however, that admissions from the various counties, in case there is a waiting list, shall be prorated according to the population of the counties."

In regard to the support of such a free patient, Section 199.040, RSMo 1949, provides as follows:

"The division of health shall fix the sum due for the care and treatment of free patients at a rate not to exceed seven dollars and fifty cents per month for each patient. Such sum shall be collected from the several counties as provided by law."

Sections 31.030, 31.040, and 31.050, RSMo 1949, provide a system for the collection of the money due from those responsible for the support of patients, and more specifically in regard thereto, Section 31.050, RSMo 1949, provides:

"It shall not be lawful for the superintendent * * * to receive any person as a patient until the sum or sums required by law to be paid by any county * * * for the support of such patient has been paid to the department of revenue as provided by law. * * *"

Honorable Gordon C. Shaffer, Jr.

In regard to the responsibility of the county of residence attention is called to the somewhat general provision of our statutes regarding poor persons. Section 205.580, RSMo 1949, (9590, R.S. Mo. 1939) provides:

"County to support poor. - Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

The responsibility of the counties of this state for their residents has been decided on many occasions by the courts in matters concerning the insane poor and in regard to that, it has been said:

In Walton v. Christian County, 235 Mo. 385, 1.c. 389:
"* * * The liability of the counties of the state imposed by statute in cases like the present is conditioned upon the residence and insolvency of the criminal at the time of the conviction and his subsequent insanity while in the penitentiary. * * *"

In State v. Smith, 96 S.W. 2d, 40, 1.c. 41, the court said:
"(2) We are of the opinion that it is the duty of a county to support the poor who are within its boundaries. * * *"

In accordance with the statutes and the opinions of the courts construing and interpreting them, it is the duty of the county of residence to support a poor person. No statute or court decision has been found divesting the counties of this burden. No statute or court decision has been found which fixes the responsibility of support upon the place, county, or city, where a sentence may have been pronounced, or upon the state when a convict in the penitentiary develops tuberculosis.

CONCLUSION

It is, therefore, the opinion of this department that an application to be admitted as a free patient should be made to the county court of the county in which the applicant is a resident. If he has been sentenced to the penitentiary, then such application should be made to the county in which the applicant was a resident at the time of the imposition of the sentence.

Respectfully submitted,

James W. Faris
JAMES W. FARIS
Assistant Attorney General

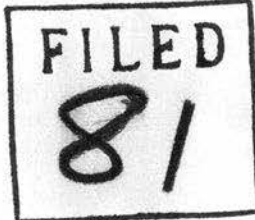
APPROVED:

CBP

J. E. TAYLOR
Attorney General

JWFab

COUNTY COLLECTORS,
SECOND CLASS COUNTIES:



The county court in second class counties may require a county collector to make bond in a sum equal to the largest collections made in any one month of the preceding year, plus ten percent of such sum, up to but not to exceed the sum of \$750,000. If the county court in second class counties requires the county collector to make daily deposits of all monies received by him on those days when such collections total as much as \$100.00, they may then permit him to make bond in a sum equal to only one-fourth of the largest amount collected during any one month of the preceding year, plus ten percent of such amount, up to but not to exceed the sum of \$750,000.

Mr. Gordon Shaffer, Jr.
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

March 28, 1951

4/2/51

Dear Mr. Shaffer:

This office is in receipt of your recent request for an official opinion. You thus state your opinion request:

"Our County Collector, Mr. Clifton Hurst, brought into my office House Bill #193, which was passed by the present Legislature, repealing section 52.020, Revised Statutes of Missouri 1949, relating to bonds of County Collectors, and enacting in lieu thereof, a new section relating to the same subject to be known as Section 52.020.

"This bill, as passed, specifically includes Second Class Counties in setting out the amount and method for the County Court to provide for the bonds of County Collectors.

"Section 52.380, which applies specifically to Class 2 Counties, states that the bond of the County Collector in all Class 2 Counties shall be not less than \$50,000.00 nor more than \$750,000.00, the amount of said bond to be fixed by the County Court.

"Since the House Bill hereinbefore mentioned states that the County Collector's bond shall be in the sum equal to one-fourth of the largest amount collected during any one month

Mr. Gordon Shaffer, Jr.

of the year immediately preceding his election or appointment, plus 10% of said amount, the bond for our County Collector will run in an amount greatly exceeding his bonds of the past.

"Would you kindly submit an opinion to this office as to which section our County Court should proceed in determining the amount of our County Collector's bond. It seems that since the recent passage of Section 52.020 that we now have two inconsistent statutes relating to bonds of County Collectors."

You are correct in stating that House Bill No. 193, which has become a law, repeals Section 52.020, RSMo 1949. House Bill No. 193 reads as follows:

Section 1. That section 52.020, RSMo 1949, be and the same is hereby repealed and one new section be enacted in lieu thereof to be known as section 52.020, and to read as follows:

52.020. Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent of said amount; provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred and fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. The official bond required by this section shall be signed by at least five solvent sureties; provided, that in all second, third and fourth class counties the county court in such counties may require the county collector thereof to deposit daily all collections of money in such depository or depositories as may have been selected by such county court in accordance with the provisions of sections 110.130 to 110.160, RSMo 1949, to the credit of a fund to be known as 'County

Mr. Gordon Shaffer, Jr.

24 Collector's Fund,' and such depositary or depositaries shall be
25 bound to account for the moneys in such county collector's
26 fund in the same manner as the public funds of every kind and
27 description going into the hands of the county treasurer and
28 under the same depositary bond as required to be given
29 under section 110.160, RSMo 1949; provided further, that when
30 such deposits are so required to be made, such county courts
31 may also require that the bond of the county collector in such
32 counties shall be in the sum equal to one-fourth of the largest
33 amount collected during any one month of the year imme-
34 diately preceding his election or appointment, plus ten per cent
35 of said amount; provided further, that no such county collector
36 shall be required to make daily deposits for such days when
37 his collections do not total at least the sum of one hundred
38 dollars; and provided further, the collector shall not check
39 on such county collector's fund except for the purpose of
40 making the monthly distribution of taxes and licenses col-
41 lected for distribution as provided by law or for balancing
42 accounts among different depositaries."

You are obviously correct in stating that House Bill No. 193 specifically includes, and applies to, second class counties, of which the County of Buchanan is one.

The directorate of House Bill No. 193, in regard to the bond of county collectors in all Missouri counties, is clear enough. That directorate is that the bond shall be in a sum equal to "the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent of said amount; provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred and fifty thousand dollars * * *."

House Bill No. 193 then proceeds to state that under certain circumstances the above mentioned directorate in regard to the amount of the bond of county collectors shall not be followed in second, third, and fourth class counties. These circumstances are that in second, third, and fourth class counties the county court may require the collector to make a daily deposit of all moneys collected by him (unless such amount does not total the sum of one hundred dollars), and that, if the county court does make this daily deposit requirement, it then may require that the bond of the collector be in a sum of one-fourth of the largest amount collected during any one month of the preceding year, plus ten per cent of such amount.

In other words, the county court, in second, third and fourth class counties, may, under House Bill No. 193, do any one of three things in regard to the collector.

Mr. Gordon Shaffer, Jr.

First, they may require him to make a bond in a sum equal to the largest collections made in any one month of the preceding year, plus ten per cent of such sum, up to the sum of seven hundred fifty thousand dollars.

Second, the county court may make all of the requirements detailed in "First" above, and in addition require the collector to make daily deposits of all moneys received by him on days when such collections total as much as one hundred dollars.

Third, the county court may require the collector to make the daily deposits referred to in "Second" above, subject to the condition mentioned, and may permit him to make bond in a sum equal to only one-fourth of the largest amount collected during any one month of the preceding year, plus ten per cent of such an amount, up to but not to exceed the sum of seven hundred fifty thousand dollars.

We now direct your attention to Sections 52.360, 52.370, and 52.380, RSMo 1949, Chapter 52, which is entitled "County Collectors," which aforesaid sections are under the subhead, "Provisions Applicable to Class Two Counties." These sections read as follows:

"52.360. Daily deposits and reports--interest (class two counties). - It shall be the duty of the county collector, in all counties of the second class, to deposit each day in the depository or depositories selected by the county for the deposit of county funds, all money received by him as county collector during the day previous, and to make a daily report thereof to the county auditor, as provided in section 55.190, RSMo 1949 or if there be no county auditor, then the county collector shall make such reports to the clerk of the county court, in the same manner. The interest on all such money deposited by the county collector shall be computed upon the daily balances of said deposits, and all such interest shall be paid and turned over to the county treasurer at the same time and in the same manner that the monthly settlement and payment are made by the collector, and such interest shall go to and become a part of the general revenue fund of the county. (13909, A.L. 1945 p. 1405)"

Mr. Gordon Shaffer, Jr.

"52.370. Disbursement by check (class two counties). - All money disbursed by the county collector by virtue of his office shall be paid by check signed by the collector and countersigned by the auditor of the county. (13910)"

"52.380. Bond (class two counties). - From and after the taking effect of this section the bond of the county collector in all counties herein included shall be not less than fifty thousand dollars nor exceeding seven hundred and fifty thousand dollars, the amount of said bond to be fixed by the county court, the cost of said bond shall be paid out of the general revenue fund of the county and shall otherwise be executed and subject to the provisions of this chapter. (13911)"

We will here call attention to the fact that Section 52.360, quoted above, was enacted by the 63rd General Assembly and became effective July 1, 1946; that Sections 52.370 and 52.380, quoted above, were both enacted in 1921.

A reading of the above sections reveals that at numerous points they are in direct conflict with House Bill No. 193. For example, Section 52.360 requires the collector in second class counties to make daily deposits of all moneys collected by him during the previous day, whereas House Bill No. 193 does not make such a requirement, but puts in the hands of the county court the power to make such a requirement if they see fit to do so. Furthermore, Section 52.360 requires that the collector, in second class counties, deposit daily all moneys collected by him the previous day regardless of amount, whereas House Bill No. 193, as we said above, leaves in the hands of the county court the power to require the collector to make daily deposits, but also takes from the county court the power to require daily deposits on those days when the total amount collected does not equal one hundred dollars.

Furthermore, Section 52.380, quoted above, fixes, for second class counties, a minimum bond of fifty thousand dollars and a maximum bond of seven hundred fifty thousand dollars, whereas House Bill No. 193, which includes in its provisions second class counties, fixes the same maximum but does not set any minimum figure.

From the above, it must be clear that there is an irreconcilable conflict between House Bill No. 193, insofar

Mr. Gordon Shaffer, Jr.

as it relates to second class counties, and Sections 52.360 through 52.380, RSMo 1949, which pertain exclusively to second class counties.

It is our belief, as stated above, that there exist irreconcilable conflicts between House Bill No. 193 and Sections 52.360 through 52.380. House Bill No. 193 was enacted subsequently to Sections 52.360 through 52.380. Sections 52.360 through 52.380 constitute a "special law" dealing only with counties of the second class; House Bill No. 193, insofar as it purports to regulate the amount of the county collector's bond in counties of the second, third and fourth class is also a "special law" as distinguished from a "general law." In the case of *Reals v. Courson*, 164 S.W. 2d 306, the court stated, in part:

"A statute which relates to persons or things as a class, is a general law, while a statute which relates to particular persons or things of a class is a special law."

The above definition was quoted with approval in *Laclede Power & Light Company v. City of St. Louis*, 182 S.W. 2d 70, l.c. 72. We believe that Sections 52.360 through 52.380 constitute a "special law," since they apply only to collectors in a particular class of counties, to-wit, counties of the second class, and that insofar as House Bill No. 193 purports to relate to counties of the second, third, and fourth classes, it, too, constitutes a "special law."

We will now consider the matter of whether, and to what extent, a later statute repeals a prior statute when the two are in conflict.

At this point we desire to call attention to the fact that House Bill No. 193 does not specifically repeal Section 52.020, RSMo 1949, but that if it repeals Sections 52.360 through 52.380, it does so only by implication.

The law is well settled that a later act will repeal a prior act if the two are so inconsistent that both cannot stand.

In the case of *Templeton v. Insurance Co. of North America*, 201 S.W. 2d 784, at l.c. 789, the court said:

"There could be no contention that Section 5940 expressly repealed Section 5933. All that Section 5940 expressly repealed was

Mr. Gordon Shaffer, Jr.

Section 7030, R.S. Mo. 1909, in lieu of which it was enacted; and if it nevertheless had the effect of repealing Section 5933, it only did so by implication. However, repeals by implication are not favored, (State ex rel. St. Louis Police Relief Ass'n. v. Igoe, 340 Mo. 1166, 107 S.W. 2d 929); and in the absence of express terms, a later statute will not be held to have repealed a former one unless there is such a manifest and total repugnance between their respective provisions that the two could not possibly stand together. State ex rel. and to use of Geo. B. Peck Co. v. Brown, 340 Mo. 1189, 105 S.W. 2d 909; Graves v. Little Tarkio Drainage Dist. No. 1, 345 Mo. 557, 134 S.W. 2d 70."

In the case of Vining v. Probst, 239 Mo. App. 157, 186 S.W. 2d 611, the court said in part as follows, at l.c. 164:

"* * * If there be any conflict between two statutes dealing with the same common subject matter, the statute which deals with it in a minute and particular way will prevail over one of a more general nature; and the statute which takes effect at the later date will also usually prevail. Measured by both of these last mentioned rules, the provisions of the 'Small Loan Laws' prevail over those of the interest laws. If the later law did repeal the earlier, in part, by implication, it did so only insofar as the two may be in conflict; but, in any event, it is apparent that there are cases such as that now under consideration where the provisions of both statutes cannot be applied effectively. (State v. Taylor, 18 S.W. (2d) 474, l.c. 477, 323 Mo. 15.)"

In the case of State v. Taylor, 18 S.W. 2d 474, the court stated l.c. 476, in part, as follows:

"* * * The two acts should be construed so that each may stand and be given effect, if possible. The later statute should be construed to repeal the former only in so far as the two acts may be found to be in con-

Mr. Gordon Shaffer, Jr.

flict. *Wrightsmen v. Gideon*, 296 Mo.
214, loc. cit. 223, 247 S.W. 135, and
cases cited."

We believe it to be obvious that it was the intention of the Legislature to provide in House Bill No. 193 the complete law regarding county collectors' bonds in counties of the second class, because line 18 of such bill, as originally introduced, referred only to third and fourth class counties but was amended so as to apply specifically to second class counties by Senate Amendment No. 1, which was introduced by Senator Smith of Greene County. (Journal of the Senate, 66th General Assembly, page 296.)


CONCLUSION

The county court in second class counties may require a county collector to make bond in a sum equal to the largest collections made in any one month of the preceding year, plus ten per cent of such sum, up to but not to exceed the sum of seven hundred fifty thousand dollars.

If the county court in second class counties requires the county collector to make daily deposits of all moneys received by him on those days when such collections total as much as one hundred dollars, they may then permit him to make bond in a sum equal to only one-fourth of the largest amount collected during any one month of the preceding year, plus ten per cent of such amount, up to but not to exceed the sum of seven hundred fifty thousand dollars.

Respectfully submitted,

APPROVED:


J. E. TAYLOR
Attorney General

HUGH P. WILLIAMSON
Assistant Attorney General

HPW:ab

Sec 163.090 RSM 1949
TRAINING SCHOOLS: ~~Law~~ relating to re-employment of
EDUCATION: teachers not applicable to employees
SCHOOLS: of training schools.

April 9, 1951

Honorable W. E. Sears
Director, State Board of
Training Schools
Jefferson City, Missouri

4-9-51
FILED
81

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"Teachers employed by the Missouri State Board of Training Schools to offer approved work as provided for in the Missouri State course of study, are employed under provisions of the State Merit Act. It is my understanding that these teachers serve their first year (nine months school term or 180 school days) as a part of their probationary period provided for under Merit regulations.

"In view of the above information and the fact that no money from state funds (regular school apportionments) are made available for the payment of these teachers salaries; I respectfully desire to have your opinion as to whether or not Section 163.090, Laws of Missouri, Volume I, 1949, is applicable to the various teachers under the Board of Training Schools.

"You will observe Section 163.090 provides that notice shall be given to teachers prior to the 15th day of April of each school year. Accordingly, it is requested that your opinion be returned to me as far in advance of the above date as possible."

Honorable W. E. Sears

Section 163.090, R.S. Mo. 1949, provides, in part, as follows:

" * * * It shall be the duty of each and every board having one or more teachers under contract to notify each and every such teacher in writing concerning his or her re-employment or lack thereof on or before the fifteenth day of April of the year in which the contract then in force expires. Failure on the part of a board to give such notice shall constitute re-employment on the same terms as those provided in the contract of the current fiscal year; * * *"

The question presented in your request is whether the above statute applies to the employment of teachers at the training schools.

Section 163.090, supra, was enacted in 1943 (Laws of 1943, page 889). The title to said act reads as follows:

"AN ACT to amend Article 2, Chapter 72, Revised Statutes of Missouri, 1939, by adding immediately after Section 10342 thereof a new section to be known as Section 10342a and relating to the re-employment of teachers already under contract."

Article 2, Chapter 72, R.S. Mo. 1939, relates to "Laws Applicable to All Classes of Schools." A reading of the chapter discloses that the schools provided for in said article are the free public schools recognized in Section 1(a), Article IX of the Constitution of Missouri, 1945.

Section 38, Article IV of the Constitution of Missouri, 1945, reads as follows:

"All state training schools and industrial homes for boys and girls shall be classified as educational institutions and shall be in charge of a board of six trustees, three from each of the two major political parties, appointed by the governor by and with the advice and consent of the senate. All employees of the board shall be selected and removed as

Honorable W. E. Sears

provided for employees in the state
eleemosynary institutions."

When the above constitutional provision designates the training schools as educational institutions it does not mean that they are a part of the free public school system, but designates them as such institutions as distinguished from correctional or penal institutions which they were considered before the adoption of the 1945 Constitution. It will be noted that it is further provided that the employees of the board shall be selected as provided for employees in state eleemosynary institutions.

Section 19, Article IV of the Constitution of Missouri, 1945, provides that all employees in the state eleemosynary institutions shall be selected on the basis of merit. Our Merit System Act sets up a complete scheme for the employment and removal of the employees of the State Board of Training Schools. Therefore, that act is complete and exclusive in any matters dealing with the employment of the personnel of the State Board of Training Schools, and Section 163.090, supra, which relates to teachers in our free public school system, is not applicable to the teachers employed by the State Board of Training Schools.


CONCLUSION

It is therefore the opinion of this department that Section 163.090, R.S. Mo. 1949, which relates to the re-employment of teachers, is not applicable to the teachers employed by the State Board of Training Schools.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

AMO'K:ml

CONSUMER CREDIT -
LOANS:

Lenders securing certificates of registration to conduct consumer credit loan business under Senate Bill No. 78, 66th General Assembly of Missouri, required to procure such registration certificates from and after June 7, 1951.

May 17, 1951

5-18-51

Honorable H. G. Shaffner
Commissioner, Division of Finance
Department of Business and Administration
Jefferson City, Missouri



Dear Mr. Shaffner:

The following opinion is rendered in reply to your recent inquiry reading as follows:

"Under Senate Bill No. 78 of the 66th General Assembly, State of Missouri, by what date is a person desiring to make consumer credit loans required to obtain a certificate of registration."

Senate Bill No. 78, passed by the 66th General Assembly of Missouri contains an emergency clause in Section 12 thereof which provides in part as follows:

"* * *This act shall be in full force and effect from and after its passage and approval."

Senate Bill No. 78 was signed by the Governor on May 8, 1951 and such date becomes the effective date of the law. Section 3 of Senate Bill No. 78 provides as follows:

"Application for certificate of registration shall be in writing in the form prescribed by the Commissioner. No certificate of registration is required until thirty days after this act becomes effective, during which period such application may be made."

CONCLUSION

It is the opinion of this department that lenders engaged in the business of making consumer credit loans


Honorable H. G. Shaffner

by virtue of the authority contained in Senate Bill No. 78, passed by the 66th General Assembly are required to have certificates of registration authorizing them to engage in such business from and after June 7, 1951.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

JLO'M:ba

INHERITANCE TAXES:
PAYMENT: PROCEDURE ON
LEGATEE'S DEATH:

In determining amount of inheritance taxes on C's inheritance from B's estate, value of B's interest in A's estate when paid to B's administrator will become part of assets of B's estate.

September 24, 1951

9-25-51

Honorable Samuel E. Semple
Prosecuting Attorney
Randolph County
Moberly, Missouri



Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads as follows:

"This situation has arisen in connection with the appraisement of an estate for state inheritance tax purposes, and since I am notified of these appraisements, and have certain official duties in connection with them, I desire your opinion on the following matters:

"A died intestate on 6/3/50, leaving, among others, an heir B. The estate of A is in process of administration. An appraisement for state inheritance tax purposes was made in A's estate, and the tax determined to be due on what B would inherit was paid by the administrator of A's estate, out of estate funds. Before any order of distribution was made in A's estate, and before any actual distribution from A's estate was made to B, the death of B occurred. B died intestate, leaving a daughter, C. B's estate is in process of administration. Shortly, an order of distribution will be made in A's estate, and the share which B would have received will be paid to the administrator of B's estate.

Honorable Samuel E. Semple

"My questions are: (1) When the tax due from C on her inheritance from B is determined, will the amount which B's estate will receive from A's estate be added in and counted an asset of B's estate, for the purpose of determining the amount of tax C will pay as B's heir, in view of the fact that B never received anything from A's estate during B's lifetime, and could not have received anything before an order of distribution was made?

"(2) If the amount of the tax in B's estate is increased by what B's estate will receive from A's estate, will B's estate receive any credit because of the fact that the tax on B's supposed inheritance from A was paid out of A's estate, and, therefore, deducted from the inheritance B would have received if B had lived?"

Your first question is concerned with the proposition as to whether or not property, or rather its value passing from A's administrator to B's administrator, is to be included in the assets of B's estate for the purpose of determining the state inheritance tax upon the interest of such estate passing to C, since B, never came into the possession or enjoyment of any property during his lifetime, from the estate of A.

In the case of *In re Costello's Estate* 92 S. W. (2d) 723, a very similar state of facts existed to those outlined in your letter and since we rely on that case as authority for our holding herein, we call attention to the facts, and shall quote from a part of the opinion before entering upon our discussion.

From the facts given, James Costello died in Clay County, Missouri on December 27, 1933, his sisters, Miss Nellie Costello and Mrs. Katie F. Robison, were to share equally as residuary legatees under his will.

Before any distribution had been made to her from her brother's estate, Mrs. Robison died, leaving a will by which her two daughters Mrs. Francis R. King and Miss Henrietta Robison, the appellants, were sole legatees, and executrices of her estate under said will.

Honorable Samuel E. Semple

The inheritance tax appraiser of the James Costello estate, filed his report finding a tax due on the interest in said estate left to Miss Nellie Costello and on that left to Mrs. Katie F. Robison. The daughters of Mrs. Robison filed exceptions to such report, and upon it being overruled by the Probate Court, took an appeal.

The appellants contended that under the inheritance tax statutes a tax can be imposed only when the beneficiary comes into possession and enjoyment of the property, and that if Katie F. Robison died before she came into possession and enjoyment of the property willed to her by James Costello, that no tax could be imposed upon her share of said estate.

The section of the statute involved is Section 570, Laws of Missouri 1931, page 130. Said section reads as follows:

"A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or any interest therein or income therefrom, in trust or otherwise, to persons, institutions, associations, or corporation, not hereinafter exempted, in the following cases: When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state. When the transfer is by will, or intestate law of property within the state. When the transfer is by will, or intestate law of property within the state or within the jurisdiction of the state and decedent was a non-resident of the state at the time of his death. When the transfer is made by a resident or by a non-resident when such non-resident's property is within this state or within its jurisdiction, by deed, grant, bargain, sale or gift made in contemplation of the death of grantor, vendor, or donor, or intending to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale or gift made within two years prior to the death of grantor, vendor, or donor, of a material part of his estate or in the nature of a final disposition or distribution thereof without an adequate valuable consideration shall be construed to have been made in contemplation of death within the meaning of this section. When the transfer is made by a resident or by a non-resident

Honorable Samuel E. Semple

when such non-resident's property is within this state or within its jurisdiction, in trust or otherwise and the transferor has retained for his life or any period not ending before his death, (1) the possession or enjoyment of or the income from the property, or (2) the right to designate the persons who shall possess or enjoy the property or income therefrom, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Such tax shall be imposed when any person, association, institution or corporation actually comes into the possession and enjoyment of the property, interest therein or income therefrom, whether the transfer thereof is made before or after the passage of this law: Provided, that property which is actually vested in such persons or corporations before this law takes effect shall not be subject to the tax."

(Italics Courts.)

It is noted that the above quoted section is the same in substance and effect as Subsection 1 and 2, of Section 145.020, RSMo 1949.

In passing upon the contentions of the appellants, the court called attention to certain portions of Section 570, and we quote from that part of the opinion at l. c. 725, as follows:

"We now state the applicable provision of section 570, which follows:

"A tax shall be and is hereby imposed upon the transfer of any property * * * not hereinafter exempted, in the following cases: When the transfer is by will * * * from any person dying possessed of the property while a resident of the state. * * *

"Such tax shall be imposed when any person, * * * actually comes into the possession and enjoyment of the property."

"The act does not expressly exempt the property in question. Even so, appellants contend that said italicized words should be construed as an exemption. In considering the question, it would be noted that the original assessment is made by section 570 in words as follows: 'A tax shall be and is hereby imposed upon the transfer of

Honorable Samuel E. Semple

any property.' This assessment is a lien on the property for payment. It also should be noted that section 578 (Mo. St. Ann. Sec. 578, p. 358) makes reference to the 'final assessment of tax.' It is clear that the Legislature intended an original assessment and a final assessment of the tax.

"It also is clear that the Legislature did not intend by said italicized words to require the executor or administrator, on distribution, to pay the distributee the share and thereafter impose the tax. Indeed, it is provided in section 578 that the tax must be deducted or collected before delivery of the property to the distributee. But defendant argues that Mrs. Robison never actually came into the possession and enjoyment of the property. In this connection it also should be noted that the italicized words provide that the tax shall be imposed when any person actually comes into the possession and enjoyment of the property. The words 'any person,' as used, mean a person or persons lawfully entitled to possession and enjoyment. If so, the act provides for the imposition of the tax when the executrices of the estate of Mrs. Robison actually come into the possession and enjoyment of the property. As used, the word 'enjoyment' does not mean personal enjoyment. It means control.

"Furthermore, Mrs. Robison had a vested interest in her share of James Costello's property, subject to administration and lawful charges. She shared in any income from the property. Furthermore, she enjoyed the privilege of transferring the property by will to her daughters. We think she actually came into the enjoyment of the property within the meaning of the act. In other words, the Legislature, by the above-italicized words, only intended the time of distribution to be the time of the final assessment of the property."

Applying the rule laid down in the Costello case to the facts given in your letter, it appears that B had a vested in-

Honorable Samuel E. Semple

terest in the estate of A, subject to the administration and all other lawful charges against the estate of A, and that upon final distribution of said estate, B would have personally received his share or the value of same from A's administrator. However, B never came into the personal possession or enjoyment of any property from A's estate, since B died before the distribution of such estate property could be accomplished. When such distribution has been consummated, B's administrator will receive the property, or the value of same to the extent of B's interest in A's estate, from the administrator of same, and such property will then become a part of the assets of B's estate.

In that portion of the above quoted opinion it is noticed that in discussing that part of Section 570, supra, to which attention was specifically called, the court held that "any person" as used, meant persons entitled to the lawful possession of the property, and that "enjoyment" did not mean personal enjoyment, but control.

Likewise, in our present situation, although B did not have actual personal possession and enjoyment of any property, or interest therein from B's estate, yet, since his interest was vested at the time of his death, he did have the enjoyment thereof during his lifetime, and upon his death, whatever interest he had in A's estate passed to B's administrator.

Whenever the final order of distribution is made of A's estate, B's interest in same, consisting of property or its value in money will be transferred from A's administrator to B's administrator who will then come into possession and enjoyment thereof within the meaning of the inheritance tax law. Such property will then become a part of the assets of B's estate.

Therefore, for the reasons given above, and in answer to your first question, it is our thought that when the inheritance tax is determined on C's interest in B's estate, the value of the property or interest therein, which B's estate will receive from A's estate will be included in, and become a part of the assets of B's estate.

Your second question has been further clarified by your letter of September 19th, which reads in part as follows:

"Question 2: Assume that the administrator of A's estate paid the Missouri inheritance tax on the part of A's estate which B would have received if B had lived, and has deducted that tax from the part of A's estate which will now be distributed to B's administrator. Assume, further, that you hold, in answer to Question 1,

Honorable Samuel E. Semple

that the amount which B's estate received from A's estate must be added to the other assets of B's estate, to determine the amount of tax which C will pay as B's heir. The question, then is - - will B's estate be entitled to any credit in determining the tax which C must pay as B's heir, in view of the fact that the inheritance which B's estate received from A's estate has been so recently taxed?"

This inquiry involves similar facts, and the same principles of the inheritance tax laws as those discussed in an opinion of this office furnished the Honorable Martin E. Lawson, Attorney at Law, Liberty, Missouri. It is believed that this opinion fully answers your second question, and a copy of that opinion is enclosed for your consideration.

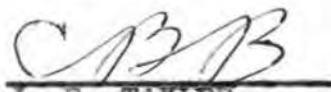
CONCLUSION

In view of the foregoing it is the opinion of this department, that in determining the state inheritance tax of C on her inheritance from B's estate, that the value of the interest of B in A's estate will upon final distribution pass from A's administrator to B's administrator and become a part of the assets of B's estate.

Respectfully submitted,

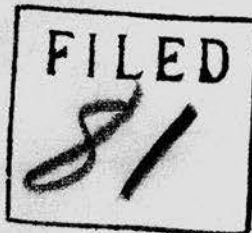
PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

PNC:hr
encl.

HOUSE BILL NO. 70: House Bill No. 70 of the 66th General Assembly of Missouri will take effect and be in force on and after the 9th day of October, 1951.



September 28, 1951

10-8-51

Honorable William E. Seay
Prosecuting Attorney
Dent County
Salem, Missouri

Dear Sir:

Your recent request for an official opinion has been assigned to me to answer. You thus state your opinion request:

"This office would like to know if an opinion has been rendered upon House Bill number 70 of the 66th General Assembly relative to whether or not the provisions are effective for the year 1951.

"If an opinion has not been rendered this office desires to know whether or not the above bill is effective for the year of 1951."

House Bill No. 70 of the 66th General Assembly of Missouri was finally passed on June 11, 1951. It was signed by the Governor on June 25, 1951.

On June 15, 1951, there was passed by the General Assembly of Missouri, House Concurrent Resolution No. 12, which reads:

"Whereas, Section 29, Article II of the Constitution of 1945 provides that if the General Assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective, shall take effect ninety days from the beginning of such recess and,

Honorable William E. Seay

"Whereas the 66th General Assembly has resolved to recess for a period beginning July 11, 1951, and ending August 15, 1951,

"Now, therefore, be it resolved by the House of Representatives and Senate jointly, that all laws passed by the 66th General Assembly of the State of Missouri, on or before the 11th day of July, 1951, and not effective, shall take effect ninety days from the beginning of said recess, that is to say, shall take effect and be in force on the 9th day of October, 1951."

House Bill No. 70 was not passed with an emergency clause and therefore, was not in effect on or before the 11th day of July, 1951.

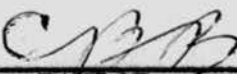
CONCLUSION

It is the opinion of this department that House Bill No. 70 of the 66th General Assembly of Missouri will take effect and be in force on and after the 9th day of October, 1951.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

HPWab

ELECTIONS: Election to supply vacancy of state representative subject to general election laws. Appointment of but two judges in each precinct not authorized.

November 21, 1951

Filed: #81

Honorable William E. Seay
Prosecuting Attorney
Dent County
Salem, Missouri



Dear Sir:

Your recent opinion request reads in part as follows:

"It has become incumbent upon this county to hold an election to fill the vacancy created by the death of our representative to the state legislature.

"Since this is a special election, I should like to know if it would be in accord with the election laws if only two judges were used in each precinct instead of four."

Section 14, Article III, Constitution of Missouri, 1945, provides that:

"Writs of election to fill vacancies in either house of the general assembly shall be issued by the governor."

The statutory provision regarding the issuance of writs of election is Section 21.110, RSMo 1949, which reads:

"Whenever the governor shall receive any resignation or notice of vacancy, or when he shall be satisfied of the death of any member of either house, during the recess, he shall, without delay, issue a writ of election to supply such vacancy."

Honorable William E. Seay

The time in which such election shall be held is provided for by Section 111.210, RSMo 1949, as follows:

"When the governor issues a writ of election to fill any vacancy, he shall mention in said writ how many days, to be not less than ten, the sheriff shall give notice thereof."

Section 21.130, RSMo 1949, provides for the duties of the sheriff upon receipt of a writ of election directed to him. This section reads:

"The sheriff to whom any writ of election shall be delivered shall cause the election to supply such vacancy to be held within the limits composing the county or district at the time of the next preceding general election, and shall issue his proclamation or notice for holding the election accordingly, and transmit a copy thereof, together with a copy of the writ, to the sheriff of each of the counties within which any part of such old county or district may lie, who shall cause copies of such notice to be put up, and the election to be held accordingly, in such parts of their respective counties as composed a part of the old county or district for which the election is to be held, at the last preceding general election; and the returns shall be made and the certificate of election granted in all things as if no division had taken place."

The general statutory provision regarding the appointment of judges of election is Section 111.270, RSMo 1949, which reads:

"In all counties in this state, four judges of election shall be appointed by the county court for each election precinct in each of said counties. It shall be the duty of said judges to select from their number two judges who shall be designated and known as receiving judges, and two who shall be designated and known as counting judges."

Honorable William E. Seay

While it is true that certain special statutes such as Section 111.290, RSMo 1949, regarding special elections on bond issues and Section 125.080, RSMo 1949, regarding constitutional amendments and proposed constitutional conventions specifically authorize the appointment of but two judges for each election precinct, no statutory provision can be found which authorizes the appointment of less than four judges at an election held pursuant to a writ of election issued to fill the vacancy created by the death of a state representative.

Therefore, the general election provision must apply and Section 111.270, supra, must be complied with.

CONCLUSION

It is therefore the opinion of this department that an election held pursuant to a writ of election issued to fill the vacancy created by the death of a representative to the state legislature must be held under the general election laws and that the appointment of but two judges in each election precinct is not authorized.

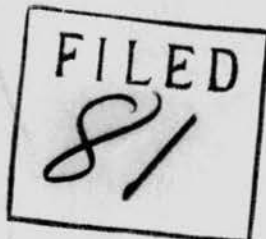
Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SOLDIERS' BONUS: Claims for soldiers' bonus which have been
filed and rejected may be refiled, recon-
sidered, allowed and paid if previous re-
jection is erroneous - including claims
BOARD OF REVIEW: passed on and rejected by Board of Review.



November 21, 1951

11-21-51

Colonel A. D. Sheppard
Adjutant General of Missouri
State Office Building
Jefferson City, Missouri

Attention: Leo B. Crabbs, Jr.

Dear Sir:

Your request for an opinion of this department
has been received, which request is as follows:

"It is asked that your office
render its opinion on the fol-
lowing question relating to the
Missouri Bonus Act of 1921.

"Section 10 of the Bonus Act
provides for the manner in which
a bonus applicant may appeal
from the decision of the Bonus
Commission to the Board of Review,
and said Section ends in the fol-
lowing words: ' - - provided,
the action of the said Board of
Review shall be final in either
case.'

"Subsequent legislation enacted
probably in 1925 provides that
'any application for the bonus
heretofore filed and rejected
may be filed before the Adjutant
General and by him again heard;
and if it appears that the rejection

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of the claim was erroneous the rejection may be set aside and the claim allowed and paid.'

"Does the latter provision make it possible to reopen a bonus claim which has been finally rejected by the Board of Review?"

Section 44(b), Article IV of the Constitution of 1875, adopted at a special election held August 2, 1921, provided for the payment of a bonus to residents of Missouri for service in World War I. Legislation enacted to implement the constitutional provision is found in Laws of 1921, Second Extra Session, page 6; Section 9577.1 - 9577.26, Mo. R.S.A. The Soldiers' Bonus Act has been omitted in the Revised Statutes of Missouri, 1949. All references to statutes hereinafter made are therefore to Missouri Statutes Annotated or the Session Acts.

Section 10 of the original act as amended, from which you quoted in the second paragraph of your request, is Section 9577.11, Mo. R.S.A., and is as follows:

"If the commission after due consideration shall finally disallow the claim of any person for the bonus under this act, the reason for such disallowance shall be filed with the application and notice thereof mailed to the applicant at his last known postoffice address. Within sixty days after such notice, the applicant may have his application reconsidered by the governor, attorney general and secretary of state, sitting as a board of review, upon filing with the secretary of the commission an application for such review. Upon the filing of such application, the secretary of the commission shall forthwith deliver to the governor all the papers and files in his office pertaining to

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such claim, and upon receipt of same the governor shall arrange for a meeting of such board of review and shall cause notice thereof to be mailed to the applicant at his said postoffice address. If upon such hearing the act of the commission be approved, a statement to that effect shall be made and signed by the governor and all the files again returned to the commission. If the said board of review shall overrule the act of the commission and allow the claim for the bonus, then such act shall also be by the governor certified to the commission, and the commission shall thereupon allow the claim and provide for its payment in the same manner as if the claim had been allowed by the commission in the first instance; provided, the act of the said board of review shall be final in either case."

(Emphasis ours.)

Section 9 of the original act as amended (Laws of 1921, Second Extra Session), from which you quote in paragraph 3 of your letter, is now Section 9 of the Truly Agreed To and Finally Passed House Bill No. 111 of the 66th General Assembly. This section is now effective, and is as follows:

"It shall be the duty of the Adjutant General to determine as expeditiously as possible the persons who are entitled to the payments under this act and to make such payments in the manner herein prescribed. Applications for such payments shall be filed with the Adjutant General on or before December 31, 1954, and at such place or places as the Adjutant General may designate

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and upon the blanks furnished by the Adjutant General. The Adjutant General shall have the power to adopt all proper rules and regulations not inconsistent herewith to carry into effect the provisions of this act. All officers of the state or any county and any city or town therein are hereby directed to furnish free of charge in writing, any information that the records in their offices may disclose relative to the identity, place and period of residence and the war service record of any soldier claiming a payment under this act whenever such information is required by the Adjutant General of any person making an application for such bonus or any part thereof. Any application for bonus heretofore filed and rejected may be filed before the Adjutant General and by him heard again; and if it appears that the rejection of the claim was erroneous, the rejection may be set aside, and the claim allowed and paid. No department of the state government shall employ any clerks for the purpose of carrying out the provisions of this act, except the Adjutant General shall employ an examiner of soldier bonus claims and one stenographer for the handling of claims."

(Emphasis ours.)

The first-quoted section (Section 9577.11) has never been amended and is now the same as the original Section 10, page 11, Laws of 1921, Second Extra Session.

The last quoted section (Section 9, page 11, Laws of 1921, Second Extra Session) has been amended numerous times (See Laws 1925, page 127; Laws 1927, page 121; Laws 1931, page 139; Laws 1933, page 396; Laws 1935, page 362; Laws 1937, page 478; Laws 1939, page 745; Laws 1941, page 648; Laws 1943, page 952, Laws 1945, page 1756; Laws 1951, House Bill No. 111).

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The re-enacting act of 1925 extended the time for filing applications for payment of bonus from December 31, 1922, to December 31, 1925, and added to the end of the original Section 9 the following: "Any application for bonus heretofore filed and rejected may be filed before the Adjutant General and by him heard again; and if it appears that the rejection of the claim was erroneous, the rejection may be set aside, and the claim allowed and paid." This added portion to the end of the original section has remained in the section through all the amendments, down to and including the above-quoted House Bill No. 111 of the 66th General Assembly.

There are no decisions on the question contained in your request. We must, therefore, resort to a construction of the two sections referred to in your request.

We call your attention to certain rules of construction of statutes. In *State v. Day-Brite Lighting, Inc.*, 220 S.W. (2d) 782, 1.c. 786, Judge Hughes, speaking for the St. Louis Court of Appeals, said:

"The primary rule of construction of statutes is to ascertain and give effect to the lawmakers' intent. * * *"

In *Donnelly Garment Co. v. Keitel*, 193 S.W. (2d) 577, 1.c. 581, the Supreme Court of Missouri said:

" * * * And a primary rule of construction of a statute is to ascertain from the language used the intent of the lawmakers if possible, and to put upon the language its plain and rational meaning in order to promote the object and purpose of the statute. *Haynes v. Unemployment Compensation Commission*, supra, 183 S.W. (2d) loc. cit. 81, and cases there cited."

The courts interpret the law as it reads and reconcile its inharmonious provisions, if possible. In discussing this rule of construction the St. Louis Court of Appeals,

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in *Teasdale v. Mayne*, 166 S.W. (2d) 316, 1.c. 322, said:

" * * * If these two sections can be construed with a view of accrediting to the Legislature a laudible purpose in enacting both sections and give to both sections life and operative effect, it is our duty to do so. *State ex rel. v. Lemay Ferry Sewer District of St. Louis County*, 338 Mo. 653, 92 S.W. (2d) 704. * * *"

This rule of construction was further discussed by the Supreme Court of Missouri, en Banc, in *State ex rel. Hotchkiss et al. v. Lemay Ferry Sewer Dist. of St. Louis County et al.*, 92 S.W. (2d) 704, 1.c. 706, as follows:

" * * * It thus appears that, when these two sections are considered separately, they appear to be in hopeless conflict. However, as they are parts of the same act and relate to the same subject-matter, they should be read and construed together and both be given force and effect, if by so doing we can effectuate the intention of the Legislature, and at the same time not violate any recognized rule of statutory construction."

Section 9 of said House Bill No. 111 has been before the Legislature for consideration nine times after it was first amended by adding thereto the following: "Any application for bonus heretofore filed and rejected may be filed before the Adjutant General and by him heard again." "Any Application" as used in this section is all inclusive and evidently means all applications which have been filed and rejected, regardless of whether they had been brought up for hearing before the Board of Review.

That part of said Section 9577.11 which is as follows: "provided, the act of the said board of review shall be final in either case," if considered alone would appear to be in conflict with the last above-quoted portion of

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said Section 9. However, our courts say: " * * * as they are parts of the same act and relate to the same subject-matter, they should be read and construed together and both be given force and effect, if by so doing we can effectuate the intention of the Legislature, and at the same time not violate any recognized rule of statutory construction."

The Legislature did not intend, by saying "the act of the said board of review shall be final in either case," to forbid an applicant whose application for bonus had been reviewed by the Board of Review from refiling his application with the Adjutant General and have the same come up for rehearing as is provided for in Section 9 of said House Bill No. 111.

If it appears that the rejection of any claim for bonus is erroneous, the rejection should be set aside and the claim allowed and paid.


CONCLUSION

It is therefore the opinion of this department that all applications for bonus which have been filed and rejected may be filed before the Adjutant General and by him heard again. If it appears that the rejection of the claim was erroneous, the rejection should be set aside and the claim allowed and paid, and this should include claims previously rejected by the Board of Review.

Respectfully submitted,

APPROVED:

GROVER C. HUSTON
Assistant Attorney General



J. E. TAYLOR
Attorney General

GCH/FH

INTOXICATING LIQUOR

) Supervisor of Liquor Control authorized to
) issue five per cent beer permit for premises
) located within 300 feet of a ~~church~~
) building not being used regularly as a place
) of religious worship.

March 21, 1951

3-21-51

Honorable Tom A. Shockley
Representative, 65th General Assembly
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads:

"At Waynesville, Missouri there is what is known the Fort Wood Theater which is regularly used seven days a week, as a motion picture theater, however, on Sundays they start the show at 2:00 P. M. and at 10:00 A. M. the management permits the Catholics to conduct church in said theater building temporarily until they get there new building completed.

"Within three hundred feet of said theater building, Mr. Sam Gould has purchased the building known as the Arcade, from Mr. Tom Allen, who for years operated the tavern in same.

"The City of Waynesville has an ordinance prohibiting the issuance of a license for the sale of intoxicating liquor within three hundred feet of any church.

"Mr. Gould has applied to the Supervisor of Liquor Control for a license to sell 5% beer in said Arcade Building and the supervisor is holding up the application until he has an opinion from your department, whether or not the Fort Wood Theater Building would be a building regularly used as a church as set out in section 311.080 R. S. Missouri 1949."

Honorable Tom A. Shockley

The pertinent section to be construed under your request is Section 311.080, RSMo 1949, which reads:

"No license shall be granted for the sale of intoxicating liquor, as defined in this chapter, within one hundred feet of any school, church or other building regularly used as a place of religious worship, without the applicant for such license shall first obtain the consent in writing of the majority of the board of directors of such school, or the consent in writing of the majority of the managing board of such church or place of worship. The board of aldermen, city council or other proper authorities, of any incorporated city, town or village, may by ordinance, prohibit the granting of a license for the sale of intoxicating liquor within a distance as great as three hundred feet. In such cases, and where such ordinance has been lawfully enacted, no license of any character shall issue in conflict with such ordinance while such ordinance is in effect."

No decision specifically construing the foregoing provision can be found. In construing said section, the whole section should be construed together, if possible, so as to give meaning to each word. See *Union Electric Company v. Morris*, 222 S.W. (2d) 767, 359 Mo. 564, State ex rel. *McKittrick v. Carolene Products Co.*, 144 S.W. (2d) 153, 346 Mo. 1049.

Applying the foregoing rule, the ordinance of the City of Waynesville referred to in your request cannot entirely prohibit the issuance of any liquor permit upon proper application, but only if the licensed premises are within the prohibited distance of a church as in this instance, and then only if such building is used regularly as a place of religious worship. So the question boils down to this - under the facts stated in your request, is said theater temporarily being used a few hours on Sunday each week for the purpose of holding religious services pending the completion of a new church, which construction now is nearing completion, said building all the rest of the time is being used for a theater, such a building as contemplated under Section 311.080, supra? In

Honorable Tom A. Shockley

Wynnefield United Presbyterian Church v. City of Philadelphia, 35 A. (2d) 276, l.c. 277, the Supreme Court of Pennsylvania, in construing an exemption under a taxing statute, held that the occasional use of a vacant lot adjoining a church building for open air services was insufficient to bring it within the definition of a regular place of stated worship, and in so holding said:

"We may add, however, that we have also examined the record to see whether the decree assigned for error is supported by evidence on the theory on which the plaintiff proceeded in the court below and must conclude that the evidence does not support the decree, and, for that reason also, we should have been required to sustain these appeals.

"In the opinion filed in disposing of the exceptions to the adjudication, the learned court said: 'Exception, however, has been taken to finding of fact No. 8, to wit: 'The lot sought to be taxed is reasonably necessary for the occupancy and enjoyment of the church building, to provide a means of ingress and egress for the congregation and to permit the church structure as built, to have sufficient light and air.' In our opinion the sole issue presented herein devolves upon the finding of fact last quoted.' The occasional use of the lot for open air services was not sufficient to bring the vacant lot within the definition of a 'regular place of stated worship.' Our examination of the evidence on the 'sole issue' specified by the learned court, requires us to conclude that it does not support the finding that the lot is reasonably necessary as a 'means of ingress and egress for the congregation and to permit the church structure as built, to have sufficient light and air, * * *.'"

In United States v. Atlantic Fruit Co., 212 Fed. 711, l.c. 713, the court, in construing the following words of a statute "regularly engaged in transportation of aliens," held that it did not mean in accordance with law, but rather continuous. In so holding, the court said: " * * * Congress

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evidently intended by 'regularly' in the act under consideration a continuous employment." Also In Re Sugarek, 77 Fed. Supp. 998, 1.c. 999, the court, in construing the word regular, said: "In decisions under Workmens' Compensation Acts, where questions analogous to that here in issue, are frequently considered, the term 'regular' is accepted as an antonym of 'casual' * * *."

This department on June 22, 1950, held that an application for a renewal of a retail liquor by drink permit must be denied where licensee's place of business is within one hundred feet of a church or other building regularly used as a place of religious worship without the consent of a majority of the board of directors of such church or religious worship. However, the facts that opinion was based upon were that the church was being used exclusively for religious worship, and apparently there was no ordinance passed by the law-making authorities of the City of St. Louis prohibiting the issuance of said permit. So, that opinion in no manner conflicts with this opinion.

Certainly under the facts stated herein and foregoing decisions construing "regularly," it is clearly indicated that said theater building is not being used regularly as a place of religious worship, and that said ordinance does not of itself prevent the issuance of a five per cent beer permit by the Supervisor of Liquor Control to this applicant under Section 311.030, supra, providing he meets all other qualifications under the law and regulations of the Supervisor of Liquor Control.

CONCLUSION

Therefore, it is the opinion of this department that under the facts stated in your request if said applicant can otherwise qualify for said permit, the mere fact temporary religious services are being held once a week in said theater, which building is otherwise used exclusively as a theater, will not of itself disqualify said applicant from obtaining a five per cent beer permit from the Supervisor of Liquor Control of the State of Missouri.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, JR.
Assistant Attorney General

J. E. TAYLOR
Attorney General

ARH:VLM

ELECTIONS: Vacancy in Congress filled by special
CONGRESSMEN: election called by Governor.

February 5, 1951

Honorable Forrest Smith
Governor of Missouri
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"A vacancy now exists in the membership of Congress from the Eleventh District of Missouri.

"Will you please render your opinion of the proper procedure under the law for filling this vacancy?"

The Constitution of the United States provides for the filling of vacancies in the representation from any state. Article 1, Section 2, Clause 4 of the Constitution, reads as follows:

"When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."

While the 17th Amendment to the Constitution provides that the Legislature of any state may empower the Executive thereof to make temporary appointments when a vacancy occurs in the representation of any state in the Senate, such power of temporary appointment does not exist when a vacancy occurs in the House of Representatives.

Section 111.210, R.S. Mo. 1949, provides as follows:

"When the governor issues a writ of election to fill any vacancy, he shall mention in said writ how many days, to be not less than ten, the sheriff shall give notice thereof."

Honorable Forrest Smith

In the case of Bottomly vs. Ford, 157 P. (2d) 108, the Supreme Court of Montana said, l.c. 110:

" * * * Section 532, Revised Codes, provides: 'Special elections are such as are held to supply vacancies in any office, and are held at such times as may be designated by the proper officer or authority.'

"Upon adoption of that statute in 1895 the United States Constitution provided, and still provides, Art. I, section 2; 'When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies,' Section 532 therefore authorizes the special election in question and the fixing of the time thereof by the Governor. * * *"

In view of the above authorities it will be seen that, when a vacancy occurs in the House of Representatives of the United States Congress, the Governor must call a special election, and in the writ of election he must specify the number of days of notice that must be given by the sheriff.

CONCLUSION

It is therefore the opinion of this department that, when a vacancy exists in the representation from any state in the House of Representatives of the United States Congress, such vacancy is filled by a special election which is called by the Governor of the state.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:ml

NEGLECTED CHILDREN:
COUNTY LIABILITY FOR
SUPPORT:
DIVISION OF WELFARE:

County in which "neglected child" is so
declared by court liable for support if child
has not been committed to guardianship.
Division of Welfare may assist county with
child welfare funds.

March 21, 1951

3-22-51

Honorable Elton A. Skinner
Prosecuting Attorney
Howard County
Fayette, Missouri



Dear Sir:

We have your recent letter in which you request an opinion of
this department. Your letter is as follows:

"We respectfully request your opinion on the
following question. The facts are thus:

"The child was born in Cooper County, Mo. on
February 10, 1940. On June 4, 1945, the
Circuit Court of Cooper County, made an
order declaring the child a neglected and abandoned
child and made him a ward of that Court. At
the same time the Court awarded Mr. and Mrs. Henry
Smith custody of the child. The Smiths assumed
no responsibility for the child's medical expenses
and a \$15.00 a month allowance was provided from
the State Boarding Funds for the child's care.
A short time ago the Smiths along with the child
moved to Howard County. The child, while attending
public school at New Franklin (Howard County)
fell and broke his arm. The school authorities
took him to the local doctor for treatment. That
doctor in turn submitted his bill to the Howard
County Welfare Board. The child is still a ward
of the Cooper County Circuit Court.

"My question is: Who is responsible for the pay-
ment of the doctor bill."

We have discussed this matter with the Division of Welfare and
have ascertained that it was the circuit court of Morgan county
that declared this child a neglected child.

Sections 211.310 to 211.510, RSMo. 1949, inclusive set forth
the law pertaining to "neglected children" in counties of the third

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and fourth classes. The counties involved in your opinion request, namely, Morgan and Howard Counties, come within this classification. The child above mentioned was a resident of Morgan county on June 4, 1945, when the circuit court of that county declared him a neglected and abandoned child. The circuit court in so doing was of course exercising its juvenile jurisdiction conferred by the statutes above cited. The court awarded custody of the child, according to your letter, to a Mr. and Mrs. Henry Smith and a \$15.00 allowance was made from state funds for the child's care, Mr. and Mrs. Smith assuming no liability for medical attention. The Smiths subsequently moved from Morgan county to Howard county, your county, taking the child with them and the child, while attending school in Howard county, broke his arm whereupon the school obtained medical attention and the local doctor submitted his bill to the Howard County Welfare Board. You ask who is responsible for the payment of this doctor's bill.

Section 211.310, RSMo 1949, and subdivisions 1 and 2 thereof, are quoted here as follows:

"Sections 211.310 to 211.510 shall apply to children under the age of seventeen years, in counties of the third and fourth classes, who are not now or hereafter inmates of any state institution or any institution incorporated under the laws of the state for the care and correction of delinquent children. When jurisdiction has been acquired under the provisions hereof over the person of a child, such jurisdiction shall continue, for the purpose of sections 211.310 to 211.510, until the child shall have attained the age of twenty-one years.

"2. For the purpose of sections 211.310 to 211.510, the words 'neglected child' shall mean any child under the age of seventeen years, who is homeless or abandoned, or who habitually begs or receives alms, is found living in any house of ill-fame; or with any vicious or disreputable person, or who is suffering from depravity of its parents, or other person in whose care it may be."

It will be observed that the section last above quoted provides that when the court acquires jurisdiction under the provisions of the section it retains that jurisdiction until the child shall have attained the age of 21. The circuit court of Morgan county in its juvenile capacity therefore still has jurisdiction of this child. It will be further observed that the above quoted section definitely

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defines a neglected child as "any child under the age of 17 years who is homeless or abandoned or who habitually begs or receives alms, is found living in a house of ill-fame; or with any vicious or disreputable person, or who is suffering from depravity of its parents or other person in whose care it may be."

Section 210.120, RSMo 1949, provides for the commitment of a neglected child to the guardianship of the Division of Welfare of the Department of Public Health and Welfare. This commitment is made by a proceeding in the circuit court in its juvenile capacity and is made for the purpose of procuring foster or boarding home care for said child. Subdivision 1 of the last cited section provides as follows:

"The juvenile court of the county of a homeless, dependent, neglected or ill-treated child's residence may commit such child to the guardianship of the division of welfare of the department of public health and welfare for the purpose of procuring foster or boarding home care for said child."

We have thus far set forth the fact that the circuit court in its juvenile capacity, once it acquires jurisdiction of the child, retains that jurisdiction until the child reaches the age of 21 years. We desire to consider this fact in connection with the provisions of Section 211.430, RSMo 1949, which section, while it pertains principally to the provisions for compelling parents who are able to support their neglected child to do so, contains the following language:

"* * * otherwise the necessary support of the child shall, until the court shall commit the child to a person or institution willing to receive it without charge, be paid out of the funds of the county, only, however, upon the approval of the judge of the circuit court."

We are of the opinion that when the last cited section states that the necessary support of such a child shall be paid out of the funds of the county upon approval of the judge of the circuit court it cannot be referring to any county other than the county in which the circuit court, having jurisdiction of the child, sits or exists. We are therefore of the opinion that while this child is in the custody of persons now living in Howard county it is still under the jurisdiction of the circuit court of Morgan county and the mere fact that the circuit court has designated a home for the child outside of the county does not, in any way, affect the liability of Morgan county for the support of the child and we are of the

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further opinion that Morgan county is therefore liable for the payment of this item of expense with the approval of the circuit court of that county unless said court, prior to the injury of the child, had committed it to the guardianship of the Division of Welfare of the Department of Public Health and Welfare for the purpose of procuring foster or boarding home care for said child as provided by section 210.120, supra. We are also of the opinion that since section 211.430, supra, makes the county liable for the support of such child, only until the court shall commit the child to a person or institution willing to receive it without charge, the county is not liable if the court has so committed the child to said Division.

However, we are informed by the Division of Welfare that this child has been placed by the court in the custody of the married couple with whom he lives under the supervision of the Division of Welfare and that said Division is contributing \$15.00 per month for board. We therefore think it appropriate to quote and discuss the following sections of the statutes of Missouri.

Section 207.010, RSMo 1949, sets forth the duties of the Division of Welfare and is quoted in part as follows:

"1. The division of welfare is an integral part of the department of public health and welfare and shall * * * * * be the state agency to:

"(1) Administer * * *;

"(2) * * * * *

"(3) * * * * *

"(4) * * * * *

"(5) Child Welfare services;

"(6) * * * * *

"(7) * * * * *."

Section 207.020, RSMo 1949, entitled "Powers of division of welfare" is here quoted in part as follows:

"* * * * *

"2. The department of public health and welfare, through and on behalf of the division of welfare,

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shall also have the power:

” ❀ ❀ ❀ ❀ ❀ ❀ ❀

"(5) To extend child welfare service funds for payment of part of the cost of district, county or other local child welfare services, and for developing state services for the encouragement and assistance of adequate methods of community child welfare organization;

"(6) To administer or supervise all child welfare activities, licensing and supervising of child caring agencies and institutions except those conducted by any well-known religious order;

"(7) The operation of state institutions for children, and the supervision of juvenile probation under the direction of, but not in derogation of, the orders of juvenile courts or the board of probation and parole."

* * * * *

(Underscoring ours.)

Section 207.060, RSMo 1949, is here quoted in part as follows:

"1. The director of welfare shall establish a county office in every county, which shall be in the charge of a county welfare director who shall have been a resident of the state of Missouri for a period of at least five years and whose salary shall be paid from funds appropriated for the division of welfare."

* * * * *

Section 208.060, RSMo 1949, is here quoted as follows:

"Application for any benefits under any law of this state administered by the division of welfare acting as a state agency shall be filed in the county office. * * * * * **The term benefits as used herein or in this law shall be construed to mean:

1. 参 参 参 参 参 参

Hon. Elton A. Skinner

"2. * * * * *

"3. * * * * *

"4. Money or services available for child welfare services;

"5. * * * * *."

We are of the opinion that section 207.010, supra, definitely provides that "child welfare services" shall be administered by the Division of Welfare and that section 207.020, supra, provides that the Division of Welfare shall have the power to supervise juvenile probation under the direction of, but not in derogation of, the order of the circuit court sitting in its juvenile capacity and that section 207.060, supra, provides that the Director of Welfare shall establish a county office of the Division of Welfare and that such office shall be in charge of a county welfare director in each county and that section 208.060, supra, provides that applications for money or services available for "child welfare services" shall be filed in the county office of the Division of Welfare.

With the foregoing deductions from the above quoted statutes in mind, together with information to the effect that the child involved has been granted a \$15.00 per month allowance from the "state child welfare fund," we are of the opinion that since additional money is needed to pay for services rendered to the child by a physician as a result of the injury mentioned in your opinion request the county welfare director of Morgan county, the county in which the court which declared the child a neglected child, sits, or whatever employee of the Division of Welfare supervises juvenile probation under the direction of the court may initiate procedure in the Morgan county office of the Division of Welfare of the State of Missouri for an allowance sufficient to defray said expenses and that said expenses may be paid from money available for child welfare services mentioned in section 208.060, supra, if said allowance shall be made.

CONCLUSION

We are, accordingly, of the opinion that since the neglected child under discussion in this opinion has not been committed by the circuit court of Morgan county to the Division of Welfare of the Department of Public Health and Welfare of the State of Missouri

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through the Morgan county office of said Division, or to any other person willing to receive him, the county of Morgan is liable for the payment of the doctor bill in question if the circuit court of Morgan county approves.

However, we are of the further opinion that since section 207.020, supra, gives the Division of Welfare the power "to extend child welfare service funds for payment of part of the cost of district, county or other local child welfare services," said Division may, through proceedings initiated in its Morgan county office, determine whether it will pay the doctor bill in question and may pay same if it reaches an affirmative decision.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney

APPROVED:


J. E. TAYLOR
Attorney General

SMW:mw

STATE COUNCIL OF DEFENSE:

CONSTITUTIONAL LAW:

State of Missouri may not advance money to federal government to use in payment of defense supplies to be purchased by federal government, but state may reimburse federal government if appropriate legislation is enacted.

June 6, 1951

6-6-51

Honorable Forrest Smith
Governor of the State of Missouri
Jefferson City, Missouri

FILED

83

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"I have been requested by Honorable Millard Caldwell, administrator of the Federal Civil Defense Administration, Washington, D. C., to seek an opinion from the Attorney General of our state on the following questions:

"(1) Whether or not the State of Missouri can legally pay into the U. S. Treasury, in trust, advance sums to be applied in payment of our share of the cost of defense equipment and supplies, and

"(2) Whether or not this state can legally reimburse the Federal government for our share in any instance where the initial outlay is wholly paid from the U. S. Treasury.

"A copy of the administrator's letter is enclosed.

"Would you kindly render your opinion on these two questions?"

Sections 26.110 and 26.120, R.S. Mo. 1949, are the only statutory provisions providing for and regarding the State Council of Defense. Section 26.110 provides:

Honorable Forrest Smith

"The governor is hereby authorized and empowered in time of emergency or public need in the nation or the state to create by proclamation a state council of defense, hereinafter designated as 'the council,' for the general purpose of assisting in the coordination of the state and local activities related to national and state defense. Whenever he deems it expedient, the governor may, by proclamation, dissolve or suspend such council or reestablish it after any such dissolution or suspension."

Section 26.120 provides:

"The council shall consist of not less than fifteen members appointed by and holding office during the pleasure of the governor. The governor shall serve as chairman of the council. He shall designate one of the members of the council as vice chairman. Appointment of members shall be made without reference to political affiliation and with reference to their special knowledge of industry, agriculture, consumer protection, labor, education, health, welfare, or other subjects relating to national or state defense."

The present General Assembly, by Section 2 of House Bill No. 1, appropriated money to the State Council of Defense, which appropriation reads as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Seventy-five Thousand Dollars (\$75,000.00) or so much thereof as may be necessary, for the use of the State Council of Defense, created by Act of the General Assembly (Laws 1941, Page 669), to pay the expenses of civilian defense, including salaries, wages, postage, rent, telegraph, telephone, express, freight, traveling expenses, stenographers, janitors, cost of supplies for emergency Medical Service, Fire Protection, Police,

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Air Raid Wardens, Emergency Public Utilities, Industrial Plant and Personnel Protection, Air Raid Warning Service, Aircraft Warning Service, purchase of films, purchase and rental of motor car equipment, office equipment, printing, stationery, Federal Old-Age and Survivors Insurance, and for all other purposes necessary to the operation of the State Council of Defense and its services for the period beginning January 3, 1951 and ending June 30, 1951."

We will take up the questions in the order in which they are set forth in the request.

I.

State of Missouri may not advance money to the United States to be applied in payment for defense equipment and supplies to be purchased.

At the outset, it must be pointed out that there is no statutory authorization which permits the Council of Civil Defense to enter into any agreement such as is outlined in the first question of the request. While it is true that Section 39 of Article IV of the Constitution provides that "In all matters of public welfare the general assembly may provide by law for cooperation with the United States, or other states," still this section is not self enforcing because it specifically requires that the cooperation with the United States must be provided for by law. However, we believe that, even if there was such statutory authorization, the law would violate other sections of the Missouri Constitution.

Section 28 of Article IV of the Constitution of Missouri, 1945, provides as follows:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the

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purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made." (Emphasis ours.)

The above section provides that for the comptroller to certify a requisition for payment there must be an obligation for the payment of money incurred. The purchase of the defense equipment and supplies by the Federal Civil Defense Administration will take place in the future. The State of Missouri, therefore, would not have incurred the obligation to pay for these supplies until the same are purchased, and for the Council of Civil Defense to withdraw money from the state treasury for these future payments would be in direct violation of the above constitutional provision.

It is further pointed out that Section 28 of Article IV of the Constitution, supra, provides that no obligation may be incurred after the termination of the fiscal period to which the appropriation relates.

It can be well seen that if money were to be advanced to the Federal Civil Defense Administration for the purchase of defense equipment and supplies, such equipment and supplies might not be purchased until after the termination of the fiscal period, to wit, June 30, 1951, and therefore an obligation would be incurred after the termination of the appropriation. Consequently, we believe that the State of Missouri cannot legally pay into the United States Treasury, in trust, advance sums to be applied in payment of defense equipment and supplies.

II.

State of Missouri may legally reimburse the federal government for the state's share of the cost of defense equipment and supplies if appropriate legislation is enacted relative thereto.

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As we have pointed out in the first part of this opinion, there is at the present time no legislation authorizing the State of Missouri or the Council of Civil Defense to enter into any compact with the United States in regard to civil defense, nor is there any statutory authorization for the Council of Civil Defense to purchase defense equipment and supplies. The sole authority and power of the council is to assist "in the coordination of the state and local activities related to national and state defense."

While it is true that the appropriation act provides for the payment of costs of supplies for various civil defense purposes, still it is the rule in this state that legislation of a general character may not be included in an appropriation bill. State ex rel. Gaines v. Canada, 342 Mo. 121, 113 S.W. (2d) 783; State ex rel. Davis v. Smith, 335 Mo. 1069, 75 S.W. (2d) 828. However, we note that Senate Bill No. 66, which has been introduced in the General Assembly, provides as follows:

"On behalf of this state enter into reciprocal aid agreements or compacts with other states and the federal government, either on a state-wide or local basis. Such mutual aid arrangements shall be limited to the furnishing or exchange of food, clothing, medicine, and other supplies; engineering services; emergency housing; police services; national guard or state guard; health, medical and related services; fire fighting, rescue, transportation and construction services and equipment; personnel necessary to provide or conduct these services; and such other supplies, equipment, facilities, personnel and services as may be needed; reimbursement of costs and expenses on such terms and conditions as are deemed necessary shall be provided for in such agreements or compacts; * * *"

We believe that if the above provision of the bill is passed, or one similar thereto is passed, this would be complete authority for the state to reimburse the federal government for defense equipment and supplies purchased by the federal government.

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CONCLUSION


It is therefore the opinion of this department that the State of Missouri may not pay into the United States Treasury, in trust, advance sums to be applied in payment of the cost of defense equipment and supplies to be purchased by the Federal Civil Defense Administration.

It is further the opinion of this department that the State of Missouri may legally reimburse the federal government for the state's share of the cost of defense equipment and supplies purchased by the federal government if legislation is enacted authorizing such expenditure and money is appropriated by the General Assembly for such purpose.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

AMO'K:ml

CONSTITUTIONAL LAW: House Bills No. 29 and No. 398 are
STATUTES: constitutional as their titles are valid.

June 29, 1951

6-30-51

Honorable Forrest Smith
Governor of the State of Missouri
Capitol Building
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your recent letter requesting an official opinion as to the constitutionality of House Bills No. 29 and No. 398 recently passed by the 66th General Assembly. This letter reads in part as follows:

"House Bills Nos. 29 and 398, Truly Agreed To copies of which are attached for your convenience, have been regularly passed by the General Assembly and delivered to me.

"In checking through these bills preparatory to executive action, I note that their titles state that they are amendatory of designated statutes; and that they purport to amend these statutes by, (1) in the case of House Bill 29, adding to said section a subsection, and (2) in the case of House Bill 398 adding designated words to the end of the section. The title of House Bill 398 does not, however, indicate that the words 'the actuary engaged by' are to be inserted in Line 2 of Section 86.593 set forth as amended, nor does the title of House Bill 29 indicate that the word 'for' is to be changed to the word 'from' in Line 1 of Section 86.063 and amended.

"Will you please render your official opinion as to the constitutionality of the titles of these bills? * * *"

Section 23 of Article III, Constitution of Missouri, 1945, provides:

"No bill shall contain more than one subject which shall be clearly expressed in its title,

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except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated."

This Section was formerly Section 28 of Article IV, Constitution of Missouri, 1875, and has been changed in form but not in substance. The purpose of this section is stated by the Supreme Court of the State of Missouri in the case of State ex rel. v. Wiethampt, 133 S.W. 329, l.c. 331, 231 Mo. 449:

"Section 28, article 4, of the Constitution is: 'No bill (except general appropriation bills, which may embrace the various subjects and accounts for and on account of which moneys are appropriated, and except bills passed under the third subdivision of section forty-four of this article) shall contain more than one subject, which shall be clearly expressed in its title.'

"There can be no doubt of the purpose of that clause in our Constitution or of its wisdom. If the design of the promoters of this act was, as is charged, to mislead the public and the members of the General Assembly as to its object or to prevent a careful consideration of the bill before its enactment into a statute, or, whether so designed by its promoters or not, if such was its effect, it falls within the constitutional limitation above quoted. In Cooley on Const. Lim. (7 Ed.) p. 205, it is said: 'It may therefore be assumed as settled that the purpose of these provisions was, first to prevent hodge-podge or "log-rolling" legislation; second, to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire.'

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"This court has said: 'The evident object of the provision of the organic law relative to the title of an act was to have the title, like a guide-board, indicate the general contents of the bill, and contain but one general subject which might be expressed in a few or a greater number of words. If those words only constitute one general subject; if they do not mislead as to what the bill contains; if they are not designed as a cover to vicious and incongruous legislation, then the title can stand on its own merits, is an honest title, and does not impinge on constitutional prohibitions.' (St. Louis v. Weitzel, 130 Mo. 600, l.c. 616.)"

The title to House Bill No. 29 reads as follows:

"To amend section 86.063, RSMo 1949, relating to police retirement systems in cities of five hundred thousand inhabitants or more, by adding to said section a subdivision (4)."

In the body of the bill, subdivision (4) was added. However, in addition thereto, the word "for" was changed to "from" in the first sentence of Section 86.063, when then read:

"Upon retirement from service a member shall receive a service retirement allowance which shall consist of:"

The question therefore is whether or not this change of the word "for" to "from" without specific reference thereto would render the bill unconstitutional under Section 23 of Article III as not having its subject clearly expressed in its title.

It is a well established principle of law that the title to an amendatory act may refer merely by section to the statute to be amended, if the subject of both be the same; State v. Spears, 213 S.W. 2d. 210, 358 Mo. 23. However, in addition to the title of House Bill No. 29 referring to the section number to be amended, it also specifically states in what manner it is to be amended, to-wit, "by adding to said section a subsection (4)." This has the effect of stating in the title in less comprehensive terms the subject of the amendment. The law with regard to such situations is reviewed and stated in the case of Graves v. Purcell,

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85 S.W. (2d) 543, 1.c. 548, 337 Mo. 574 as follows:

"* * *We must determine the effect of the particulars set forth in the light of the cardinal principle before stated that the purpose of section 28 of article 4 of our Constitution is to limit the subject-matter of the bill to one general subject and to afford reasonably definite information to the members of the General Assembly and the public as to the subject-matter dealt with by the bill. Where the title to a bill contains comprehensive language followed by particulars of less comprehensive scope, there can be no question that as to all details within the scope of the narrower language employed the provisions of the bill must be confined to the limits of the narrower language contained in the title. State ex rel. v. Hackmann, 292 Mo. 27, 237 S.W. 742; State v. Crites, 277 Mo. 194, 209 S.W. 863. In some instances the particulars set forth in the title expressly or by necessary implication restrict the meaning and scope of more comprehensive language contained in the title, and in such instances it is clear both upon principle and authority that the provisions of the bill must be confined within the limits of the particulars specified. State ex rel. v. Hackmann, supra; Vice v. Kirksville, 280 Mo. 348, 217 S.W. 77; Woodward Hardware Co. v. Fisher, 269 Mo. 271, 190 S.W. 576. But in instances where the title to the bill descends into particulars which are neither expressly nor by necessary implication restrictive of the general purpose of the bill as set forth in its title, but are merely descriptive of some of the instrumentalities or means to be employed in effectuating the general purpose of the bill as declared in its title, there is no constitutional barrier to the inclusion in the bill of provisions which are germane to and within the scope of the general purpose of the bill as declared in its title and which, although not set forth in the

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particulars expressed in the title, are not out of harmony with them. State ex rel. v. Buckner, 308 Mo. 390, 272 S.W. 940; State ex rel. v. Terte, 324 Mo. 402, 23 S.W. (2d) 120; State ex rel. v. Williams, 232 Mo. 56, 133 S.W. 1; State ex rel. v. Miller, 100 Mo. 439, 13 S.W. 677. * * *

However, in further consideration of this question, it must be remembered that there is a presumption of the constitutionality of an act of the legislature, and that Section 23 of Article III of the Constitution is to be construed liberally and that undue subtleties and refinements are not to be resorted to in order to nullify legislative action. The court further states in *Graves v. Purcell*, supra, at l.c. 548, 549, that:

"* * *Before proceeding to the consideration of the specific reasons urged in support of the contention that the statute here in question violates the provisions of section 28 of article 4 of the Constitution, we deem it appropriate to advert to certain fundamental principles which must be applied by us in properly determining the controverted issue. There is a presumption that the statute here assailed is constitutional. The burden rests upon the party questioning the constitutional validity of a statute to establish its unconstitutionality beyond a reasonable doubt, and if its constitutionality remains in doubt, such doubt must be resolved in favor of its validity. State ex rel. v. Terte, 324 Mo. 402, 23 S.W. (2d) 120; *Forgrave v. Buchanan County*, 282 Mo. 599, 222 S.W. 755. This court has long been committed to the principle that section 28 of article 4 of our Constitution must be liberally construed. State ex rel. v. Buckner, 308 Mo. 390, 272 S.W. 940; State v. Mullinix, 301 Mo. 385, 257 S.W. 121. A liberal construction of the constitutional provision in question requires that such construction be fair, reasonable, and rational, to the end that legislative action shall not be thwarted and nullified by the courts by a resort to undue subtleties and refinements or extreme and artificial formalism."

In the case of *State v. Thomas*, 256 S.W. 1028, l.c. 1030, 301 Mo. 603, we find the following:

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"It is contended in addition, however, that this act is violative of section 28 of article 4 of the Constitution, in that it contains more than one subject which is not clearly expressed in its title. In the discussion of this contention the salutary and well-established rules of construction concerning the sufficiency of titles under the Constitution should be kept in view, and under all reasonable circumstances the validity of legislative action upheld if it is possible to do so without doing violence to the language employed and the meaning evidently thereby intended to be conveyed. While it has been frequently held that the constitutional section, under review, is mandatory, it is likewise held that a title should be liberally construed in support of the power sought to be exercised by the Legislature. * * *"

In view of the foregoing, it is our opinion House Bill No. 29 is valid and that Section 23 of Article III of the Constitution is not applicable in this instance. The purpose of this constitutional provision is by no means offended as it cannot possibly be said that anyone was misled by the title of this bill when the word "for" was changed to "from" in the body of said bill. Furthermore, the constitutionality of the act is to be presumed and effect given thereto if possible. And too, we fail to see where the substance of the section has been changed except as stated in the title, the restriction of which would not be such as to require holding the Act invalid.

II.

The title to House Bill No. 398 reads as follows:

"To amend Section 86.593 of the Revised Statutes of Missouri, 1949, relating to the Firemen's Retirement System in cities of 500,000 or more inhabitants, by adding, at the end of the Section the words, 'The Board of Trustees at its discretion may change such rate in any year, provided the rate fixed for any year shall not be less than the level rate required to amortize the then remaining accrued liability within forty years from the effective date of the System.'"

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Here again, in addition to the change expressly stated in the title to the bill, there was inserted in the first sentence of the Section 86.593 as amended the words, "the actuary engaged by." Section 86.593, as amended by the bill, then reads in part:

"Immediately succeeding the first valuation the actuary engaged by the Board of Trustees shall compute the rate per cent of the total earnable compensation of all members * * *."

It would appear that the principles set forth in the case of Graves v. Purcell, supra, would be controlling. The effect of the addition of the words, "the actuary engaged by," would be to authorize the Board of Trustees to engage an actuary to assist them to carry out their duties. The granting of such authority is clearly not expressly included in the restrictive language of the title of House Bill No. 398.

However, we find that Section 86.500, RSMo. 1949, which relates to the Firemen's Retirement System in cities of 500,000 or more inhabitants, already gives the Board of Trustees the authority to engage an actuary to assist them in the discharge of their duties. Section 86.500 reads in part:

"The board of trustees shall elect from its membership a chairman and shall by majority vote of its members appoint a secretary who may be but need not be one of its members. It may engage such actuarial and other services as may be required to transact the business of the retirement system. * * *"

We therefore see that the addition of these words to the amended section add nothing whatsoever to the powers and duties exercised by the Board of Trustees and that their inclusion in the amended section is of no legal effect. In view of this, we feel that their inclusion is to be treated in the same way as House Bill No. 29 was treated above. It cannot be said that anyone was misled by the title of House Bill No. 398. There is a presumption of constitutionality of this bill and effect is to be given thereto if possible. The addition of the words are of no legal effect. We therefore feel that Section 23 of Article III of the Constitution is not applicable and that said bill is constitutional.

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CONCLUSION

It is therefore the opinion of this department that House Bills No. 29 and No. 398 of the 66th General Assembly are valid enactments and are not unconstitutional under Section 23 of Article III, Constitution of Missouri, 1945.

Respectfully submitted,

RICHARD H. VOSS,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RHV:ba

CONSTITUTIONAL LAW: House Committee Substitute for House Bills Nos. 13 and 39 is not unconstitutional nor in conflict with the extradition laws.

August 16, 1951

8-20-51



Honorable Forrest Smith
Governor of the State of Missouri
Jefferson City, Missouri

Dear Governor Smith:

Your letter of recent date requesting an opinion of this department on House Committee Substitute for House Bills Nos. 13 and 39, reads as follows:

"House Committee Substitute for House Bills Nos. 13 and 39, 'Truly Agreed To' copy of which is attached for your convenience, has been regularly passed by the General Assembly and delivered to me for executive action on or before August 25, 1951.

"Will you kindly render your opinion as to whether or not this Substitute Bill, if it were to become a law, would be in conflict with the Constitution of this State, the United States Constitution, or with federal laws or statutes."

In searching for authority on the subject involved in this bill we find that several states have adopted a similar law as the one set out and referred to herein and it has been designated in most states as a uniform reciprocal enforcement support law.

A few of the states which have passed an act of this kind are Idaho, Session Laws, Regular 1951 (Extraordinary 1950), Chapter 238, page 492; Indiana, Acts of 1951, 87th Session, Chapter 224, page 640; Iowa, Code Annotated, Vol. 11, Chapter 252A, 1950 Pocket Parts, page 21; Kansas, Laws of Kansas 1951, Chapter 352, page 540; Montana, Revised Code 1947, 1951 Accumulative Pocket Supplement, Chapter 901, Pocket Parts, page 27; North Carolina, 1951 Session Laws, Chapter 317, page 256; and North Dakota, Laws of 1951, Chapter 122, page 180, and as this new law is of recent enactment taking effect within this year, there are no court decisions directly ruling upon this law.

However, the question of whether or not a person charged with failure to support those whom he is legally obligated to support

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can be extradited from one state to a state in which he had never been, has been before the courts in Habeas Corpus hearings, and the courts have held that he can be extradited.

In Vol. 35, G.J.S., Section 3, page 319, it is said:

" * * * the right of interstate extradition or rendition is founded on and controlled by the constitution of the United States and effectuating federal statutes, which have been declared constitutional. Extradition being a federal and not a state matter, the federal law, and not the state law, is supreme, and any state legislation which conflicts with the federal law on the subject, as embodied in the constitution and effectuating statutes, is unconstitutional and void. However, to the extent that it aids and facilitates the operation of federal constitutional and statutory provisions, and is not inconsistent therewith, state legislation is proper, and must be followed. As the constitution applies only to fugitives from justice, a state may in the exercise of its reserved sovereign power provide for the surrender of persons who are indictable for crime in another state, but who have never fled from it.

"Constitutional and statutory provisions relating to interstate extradition should be liberally construed to effectuate their purposes; but, since such provisions involve the substantial rights of citizens, their essential elements and requirements have been required to be strictly followed.

"The federal Constitution guarantees no right of asylum to a person who has committed a crime in one state and fled to another."

(Underscoring ours)

Section 2, Clause 2, of Article 4 of the Constitution of the United States reads as follows:

"A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

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We believe that the above constitutional provision covers and applies to constructive flight as well as actual flight, and anyone who has committed an act in one state which results in a crime in another state can be said to be in constructive flight from the demanding state.

Section 3182, Title 18, U.S.C.A. reads as follows:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged. June 25, 1948, c. 645, 62 Stat. 822."

Section 548.010, R. S. No. 1949, reads as follows:

"Whenever the executive of any other state shall demand of the executive of this state any person as a fugitive from justice, and shall have complied with the requisites of the act of congress in that case made and provided, it shall be the duty of the executive of this state to issue his warrant, under the seal of the state, directed to any sheriff, coroner, or other person whom he may think fit to entrust with execution of such warrant."

In the case of Ex parte Gornostayoff, 298 P. 55, the District Court of Appeal of the First District, Division 1, California, on April 8, 1931, on a Habeas Corpus hearing, wherein the petitioner was sought to be extradited from the State of California to the State of Ohio on a charge of failure to support two minor children the court said:

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"* * * * * Considering the character of the offense with which he is charged, his presence within the state was not necessary to enable him to commit the same.

"Petition denied."

In a later case the District Court of Appeal, First District, Division 2, California, on December 26, 1950, Ex parte Hayes, 225 P. Rep. 2d, in passing upon the same crime in a Habeas Corpus matter at l. c. 272, the court said:

"These allegations brought the case within the rule announced in In re Brewer, 61 Cal. App. 2d 388, 143 P. 2d 33. However the return shows that our Governor acted upon a requisition from the Governor of Oklahoma based upon an amended complaint which charges Hayes with wilful failure to provide for his children in Oklahoma and charges further that 'while not personally present in the State of Oklahoma (Hayes) committed the act complained of in the State of California, intentionally resulting in the commission of said crime in the State of Oklahoma.' The quoted allegation of the amended complaint takes this case out of the field of the Brewer case cited above and places it in that of In re Morgan, 86 Cal. App. 2d 217, 194 P. 2d 800. The Morgan case holds squarely that one who commits an act in California which intentionally results in a crime in the demanding state may be extradited to that state pursuant to Penal Code section 1549.1

"Writ discharged."

In the case of Ex parte Morgan decided by the District Court of Appeal, Second District, Division 2, California, June 15, 1948, 194 P. 2d 800, at l. c. 804 the court said:

"The statute in question in this proceeding is not an obstacle to the purposes of the federal extradition act. In Re Tenner, 20 Cal. 2d 670, 675, 128 P. 2d 338, 342, the court said: 'The validity of legislation in aid of the act of Congress concerning extradition is now well established (citing cases) and it has been held that a state may legislate upon a subject of extradition unprovided for because Congress

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failed to extend section 5278 of the Revised Statutes to the full limits of constitutional power. Innes v. Tobin, 240 U.S. 127, 36 S. Ct. 290, 60 L. Ed. 562."

The Morgan case, however, was one where the fugitive was charged with the crime of conspiracy with three other defendants but the point brought out by this citation is the fact, that the provisions of House Committee Substitute for House Bills Nos. 13 and 39 do not conflict with the Federal Constitution and laws on extradition, but in fact is an act to aid the act of Congress concerning extradition.

In the case of Ex parte Bledsoe, 227 P. Rep. 2d, 680, the Criminal Court of Appeals of Oklahoma, February 7, 1951, at l. c. 683 said:

" * * * * * The federal enactments relating to extradition do not expressly or impliedly cover a situation such as that presented in the case at bar, and, since they do not, it would seem that there is no conflict between the federal and state enactments and that the latter merely supplement the former. It is to be observed that there are no negative provisions in the U. S. Constitution or federal legislation forbidding the extradition of one not physically present at the scene of crime in the demanding state."

* * * * *

"Statutes adopted by the states are not necessarily invalid if they cover a field in which the Constitution empowers Congress to legislate. The regulation of interstate commerce is a matter exclusively within the power of Congress (Const., Art. I. sec. 8 clause 3) if and when it chooses to act, but if there is no federal statute covering a particular subject a state law is not invalid because it may in some manner affect commerce between the states, although such a law would become inoperative upon the adoption of a federal statute covering the same field as that embraced by the state legislation. A state law does not conflict with federal statutes if it does not impede the execution of the will and purpose of Congress (Cloverleaf

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Butter Co. v. Patterson, 315 U.S. 148, 157 (62 S. Ct. 491), 86 L. Ed. 754, 763) or if it does not cast an undue burden upon interstate commerce (Nippert v. City of Richmond, 327 U.S. 416, 425, 66 S. Ct. 586, 90 L. Ed. 760, 765, 162 A.L.R. 844) or if its effect on such commerce is only incidental or indirect. California v. Thompson, 313 U. S. 109, 113, 61 S. Ct. 930, 85 L. Ed. 1219, 1221."'
(Underscoring is Court's Italics)

In the case of State v. Parrish, 242 Ala. 7, 1. c. 11, the court said:

"The question of extradition is treated with elaborate notes in United States Code Annotated, Constitution, Part 2, art. 2 sec.2, cl.2, and several questions material to this inquiry are noted. Pertinent references therein contained are:

"The constitutional provision relating to fugitives from justice as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several states--an object of the first concern to the people of the entire country, and which each state is bound, in fidelity to the Constitution, to recognize. Appleyard v. Massachusetts (Mass. 1906) 203 U.S. 222, 27 S. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073. See, also, McNichols v. Pease (Ill. 1907) 207 U.S. 100, 28 S. Ct. 58, 52 L. Ed. 121.

"This provision of the Constitution of the United States, requiring the surrender of fugitives from justice, is in the nature of a treaty stipulation between the States of the Union, and it is equally binding upon each State, and all of the officers thereof for its faithful execution, as though it was a part of the constitution of each State, whether Congress had passed laws relating thereto or not."'

(Underscoring, Court's Italics)

Honorable Forrest Smith

CONCLUSION

Therefore, it is the opinion of this department that House Committee Substitute for House Bills Nos. 13 and 39 does not conflict with the Constitution of this State, or with the Constitution of the United States, nor the Federal Laws and statutes on extradition.

Respectfully submitted,

GORDON P. WEIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GPW:A

FEDERAL GRANTS: Money received by Governor or his
FLOOD RELIEF: representative should be paid by
DISASTER RELIEF: Governor or his representative
directly to political subdivisions
of state to reimburse such subdivisions
for expenditures as a result of flood.

August 24, 1951

8-29-51



Honorable Forrest Smith
Governor of the State of Missouri
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date, which
letter reads as follows:

"I would greatly appreciate having your
help in solving a problem that has arisen
relative to the flood rehabilitation pro-
gram in this state.

"The federal government, through its
Housing and Home Finance Agency, Division
of Community Facilities and Special
Operations, has made, and is making, avail-
able for emergency flood rehabilitation a
sum of approximately two and one-half
million dollars. This money is being used
to reimburse political subdivisions of this
state for money spent in rehabilitating
public utility facilities as a result of
the flood which struck this state the mid-
dle of July.

"On July 31 and on August 16 I entered
into agreements with the Housing and Home
Finance Administrator whereby the federal
agency agreed to provide federal assistance
for disaster relief in sums totaling
\$2,474,500 to be allotted for specific
assistance as provided under the rules of
the federal agency.

Honorable Forrest Smith

"On July 24 I designated my secretary, Mr. James C. Kirkpatrick, 'as the authorized official of the State of Missouri to certify vouchers and/or claims in behalf of the State of Missouri for reimbursement of costs incurred by the State under the Agreement between the State and the United States of America for flood disaster relief.'

"Under the terms of these agreements all checks sent into Missouri for this flood relief will be made payable to the State of Missouri. The question has now arisen as to how this money can be speedily disbursed to those communities who have met all requirements and are now asking for reimbursement in the terms approved by or designated by the screening committee for which payment has been approved and allotted by the federal government.

"I urgently request your full cooperation and a speedy decision as to how this money can be dispatched to the stricken communities at the earliest possible time and in the most expedient manner."

There is attached to your letter an "AGREEMENT TO PROVIDE FEDERAL ASSISTANCE FOR DISASTER RELIEF," signed July 19, 1951, which agreement consists of an offer by the United States of America, acting by and through the Housing and Home Finance Administrator, to assist the State of Missouri by financial assistance in performing on public or private lands protective and other work essential for the preservation of life and property, clearing debris and wreckage, making emergency repairs to and temporary replacements of public facilities of local governments damaged or destroyed by the recent flood. Such agreement provides that the money is to be paid by the United States to the State of Missouri in such amounts incurred by local governments of the State of Missouri as the Governor of the State determines to be in need of funds for use, with a proviso that no reimbursement is to be made unless the costs are specifically authorized and/or approved by the Regional Engineer or his representative.

A "DISASTER RELIEF AGREEMENT" was entered into on the 19th day of July, 1951, between the United States of America, through the Housing and Home Finance Administrator, and Forrest

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Smith, Governor of Missouri. Such agreement provided that the federal government agreed to supplement the efforts and available resources of the state and local governments and other agencies by giving emergency assistance with federal funds.

Two amendments were made to the "AGREEMENT TO PROVIDE FEDERAL ASSISTANCE FOR DISASTER RELIEF" on July 31, 1951, and August 16, 1951, with the result that at present there has been allocated by the federal government for this disaster relief the sum of \$2,474,500.

We believe it to be clear from the provisions of the "AGREEMENT TO PROVIDE FEDERAL ASSISTANCE FOR DISASTER RELIEF" and the "DISASTER RELIEF AGREEMENT," referred to supra, that the money received from the federal government under the terms of such agreements is to be used directly for the specific purposes set out therein, and that the function of the Governor or his authorized representative is merely to certify that the money requested for the state and local governments therein, or other agencies, has been spent for disaster relief and for relieving hardship and suffering caused by the flood.

A further limitation on the expenditure of this money is found in the provision that reimbursement cannot be made unless the costs are specifically authorized and/or approved by the Regional Engineer or his duly authorized representative. Such Regional Engineer, of course, is a federal employee.

We are enclosing a copy of an official opinion of this department rendered under date of July 2, 1946, to Carl J. Henry, Chairman of the Unemployment Compensation Commission, which discusses the question of the disposition of unemployment compensation funds collected in this state. Said opinion reaches the conclusion that the money so collected is not placed in the treasury of the State of Missouri, nor is it subject to be appropriated by the General Assembly, nor do other constitutional provisions having to do with "state moneys" apply. We believe the same reasoning would be applicable in this case since this is a grant of federal money to the Governor or his representative only for the purposes set out in the agreements between the United States of America, acting by and through the Housing and Home Finance Administrator, and Forrest Smith, Governor of the State of Missouri, to expend this money to make reimbursements for moneys actually expended in relieving hardship and suffering caused by the flood disaster limited to the costs specifically authorized and/or approved by the Regional Engineer or his duly authorized representative.

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It seems clear, therefore, that the Governor or his authorized representative may make such payments out of funds received by the Governor or his representative from the federal government, and that such funds are not to be placed in the state treasury.

CONCLUSION

It is the opinion of this department that moneys received by the Governor of the State or his duly authorized representative as a result of the "disaster relief agreements" entered into between the United States and said Governor, providing for reimbursement by the federal government for expenses incurred by local governments, are not to be placed in the state treasury, but are to be transmitted by said Governor or his authorized representative to the local governments entitled thereto.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:ml
Enc.

ASSESSMENT LISTS) A separate list, including all real and tangible personal property, must be made for each taxpayer. The assessor has no authority to make a joint list for husband and wife.

*assessor cannot fill out list unless taxpayer
has been given opportunity to do so.*

September 12, 1951

9-12-51

Mr. Elton A. Skinner
Prosecuting Attorney
Howard County
Fayette, Missouri



Dear Mr. Skinner:

We have given careful consideration to your recent request for an official opinion on each of the questions contained in your letter.

Question No. 1

"If a taxpayer has signed an assessment list for his separate property, can the Assessor thereafter make a joint list for such taxpayer and his wife for their joint property without the signature of either? Would the same be true if a joint personalty list were signed by the taxpayer, could the Assessor thereafter make a joint or several realty list without the signature of either?"

Section 137.115, RSMo 1949, pertaining to the assessment of property, is as follows:

"1. After receiving the necessary forms the assessor or his deputy or deputies shall, except in the city of St. Louis, between the first day of January and the first day of June, 1946, and each year thereafter, proceed to make a list of all real and tangible personal property in his county, town

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or district, and assess the same at its true value in money in the manner following, to wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable real and tangible personal property in the county owned by such person, except merchandise which may be required to pay a license tax and except all other property which may be exempted by law from taxation.

"2. The person listing the property shall enter a true or correct statement of such property, in a printed blank prepared for that purpose, which statement after being filled out shall be signed and either affirmed or sworn to as provided in section 137.155. The list shall then be delivered to the assessor."

It is provided herein that the assessment list "shall be signed and either affirmed or sworn to" by the person listing the property. "A statute requiring a taxpayer's list to be verified by oath or affidavit must be complied with." 61 C.J. 625. "Where the law requires the taxpayers' lists to be verified by oath or affidavit, an unverified list is of no effect." 61 C.J. 626.

This statute requires each person "to make a correct statement of all taxable real and tangible personal property" owned by him in the county. The next section, 137.120, provides that each list shall contain all the real estate and various items of tangible personal property of the taxpayer. The oath or affirmation must state "that the foregoing list contains a true and correct statement

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of all the real property and tangible personal property" owned or managed by the taxpayer on the first day of January. It is evident, as herein pointed out, that the law requires all real estate and tangible personal property of a taxpayer to be included in one list.

A separate list must be made out for each taxpayer. If a husband and wife own separate properties, either in real estate or personalty, a list must be made out for each person.

A peculiar situation arises, however, in case of an estate by the entirety, which is created by a conveyance to a husband and wife by a deed in the usual form. It is one estate vested in two individuals who are by law regarded as one person, each being vested with the entire estate. Neither can sell or dispose of his or her interest without the concurrence of the other. In case of the death of either party, the other retains the entire estate by the right of survivorship. The estate remains the same as it was, except that there is only one owner instead of two. An estate by the entirety may exist in the form of personal property as well as real estate. For the purpose of assessment any estate by the entirety should be treated as a distinct ownership, and a separate list should be made out for the estate. In all other cases of joint ownership, such as tenancy in common and joint tenancy, the interest or part of each owner should be listed as any other item of property. (An opinion of this office covering these questions, for W. A. Holloway, 1941, is herewith enclosed.)

CONCLUSION

It is the opinion of this office that a separate list, including all real and tangible personal property, must be made for each taxpayer, and this rule applies to a husband or a wife. The assessor has no authority to make a joint list. An estate by the entirety is simply a joint ownership for which a separate list should be made.

Question No. 2

"Does the Assessor have the right to make a list if he has not requested the taxpayer to make one?"

Mr. Elton A. Skinner

Section 137.130, RSMo 1949, is as follows:

"Whenever there shall be any taxable property in any county, and from any cause no list thereof shall be given to the assessor in proper time and manner, the assessor shall himself make out the list, on his own view, or on the best information he can obtain; and for that purpose he shall have lawful right to enter into any lands and make any examination and search which may be necessary, and may examine any person upon oath touching the same."

The Supreme Court of Missouri gave meaning to this law in the case of *State ex rel. Hawkin v. Edwards*, 286 S.W. 25. In the course of that opinion, on page 26, the court said: "The failure of a property owner to return his property for taxes authorizes an assessor to fix a valuation."

The assessor, however, must call at the office, place of business, or residence of each taxpayer and require him to make a correct statement of all his taxable property, as required by Section 137.115, *supra*, and there is no law authorizing such officer to make a list until he has performed his duty.

This interpretation of the statute has been sustained by the Supreme Court of Missouri in numerous cases. In *State ex rel. Wenneker v. Cummings*, 151 Mo. 49, 1.c. 59, the court said:

"Tested by these rules, it must be held that when the assessor, Brokate, went in person, on June 9, 1894, to the residence of defendant, and left the printed notice and blank list requiring defendant to list his property, and defendant received that list on that day, the jurisdiction to assess attached. If, after

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receiving this blank list and notice, he failed to make out his own list, or refused peremptorily to do so, as is shown by his evidence, then the law authorized the assessor (section 7535) to make out the list on his own view, or 'on the best information he could obtain.' * * *

In the case of State ex rel. Wyatt v. Hoyt, 123 Mo. 348, 1.c. 354, the court said:

"It would be utterly impossible for an assessor to remember, and be able to testify to the fact, that lists had been left with each property owner, and that they had not been returned as required by law. Hence the statute requires that the fact of leaving the list should be specially noted by the assessor. The right and power of the assessor to make the assessment depends upon the due performance of his duties in respect to these requirements. * * *

CONCLUSION

It is the opinion of this office that the assessor has no right to make a list if he has not made reasonable effort to obtain one from the taxpayer.

Question No. 3

"Is an assessment form which bears the taxpayer's name and real estate tract number but no description, valuation or signature a valid list? Does the omission of any of the above from the list invalidate the same?"

The legal description of the land and the valuation thereof are essential in the listing of real estate, and

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the signature of the taxpayer, under oath or affirmation, is necessary when the list is made out by the taxpayer himself. "He must include all his taxable property according to its nature, and the directions of the statute." 61 C.J. 624.

CONCLUSION

It is the opinion of this office that the omission of any of these essentials invalidates the list.

Question No. 4

"Is the Assessor entitled to compensation for lists incomplete in any manner above described?"

CONCLUSION

It is the opinion of this office that the assessor is not entitled to compensation for a list not complete in all respects required by law.

Questions Nos 5, 6 and 7

"When is the County Court required to compensate the Assessor after completion of the County Assessment?"

"May the Presiding Judge and County Clerk reject any list without approval of the full Court?"

"Is the Assessor required to turn over to the County Clerk his assessment lists immediately upon completion of same? If not, when must they be turned over to the Clerk?"

Section 137.245, RSMo 1949, requires the assessor to "make out and return to the county court, on or before the thirty-first day of May in every year, a fair copy of the assessor's book, verified by his affidavit annexed thereto,..."

Mr. Elton A. Skinner

Section 50.160, RSMo 1949, provides that "The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts;...."

It should be noted here that the statute gives the county court power to audit, adjust and settle accounts. The authority is vested in the court. There is no law authorizing the presiding judge and county clerk to reject an assessment list without approval of the court.

CONCLUSIONS

It is the opinion of this office that the assessor is required to make out and return his assessment lists to the county court on or before the thirty-first day of May in every year.


It is also the opinion of this office that the county court is required to compensate the assessor as soon as his lists may be audited and adjusted.

It is also the opinion of this office that the presiding judge and county clerk do not have authority to reject an assessment list unless so ordered by the county court.

Respectfully submitted,

APPROVED:

B. A. TAYLOR
Assistant Attorney General



J. E. TAYLOR
ATTORNEY GENERAL

BAT;fh

SECURITIES:
BLUE SKY LAW:

Sale of burial contracts providing for payment on the installment plan does not constitute a sale of a security under Missouri Blue-Sky Law.

October 2, 1951

Honorable W. Randall Smart
Commissioner of Securities
Jefferson City, Missouri

FILED

83

10-3-51

Dear Sir:

This department acknowledges receipt of your letter, in which you request an official opinion from this office. Your request reads as follows:

"We are in receipt of a letter from the Better Business Bureau of Kansas City enclosing therein a photostatic copy of the contract entered into by the FLORAL HILLS MEMORIAL CHAPELS, INC., with Marie C. Larson, purchaser of the casket and funeral service and an instrument referred to as Supplementary Protective Agreement, and requesting that we determine if these instruments are securities and as such subject to registration under our Securities Act.

"We, therefore, ask that you please examine these instruments and let us have your opinion, as to whether the contract and supplement instrument are to be considered securities under our State Securities Act."

In Chapter 409, Section 409.020, RSMo 1949, the term "security" or "securities" is defined as follows:

"The term 'security' or 'securities' means any note; stock, treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate, receipt,

Honorable W. Randall Smart

or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; beneficial interest in or title to property or profits; any certificate, contract, receipt or instrument whatsoever representing or constituting evidence of, or secured by, title to or interest in any oil, gas or mining lease, royalty, or deed, and interest, units or shares in any such lease royalty, or deed; or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing; provided, however, that the term 'security' or 'securities' shall not include any stock, scrip or other certificate of interest heretofore or hereafter issued by any building and loan association or savings and loan association incorporated under the laws of this state or of the United States and subject to examination, supervision and control by either or both."

A certificate is defined in Webster's International Dictionary as "a certified statement; a written testimony to the truth of any fact." The word "interest" is defined as being "a right, title, share or participation in a thing; specif., participation in advantage, profit and responsibility." A certificate of interest, therefore, is a written testimony to the truth of a right, title, share or participation in a thing.

In the case of Royal Loan Co. et al., V. United States 154 F. 2d 556, the question of the definition of a security is discussed as follows, l.c. 558:

"A security is evidence of debt or of property, and a corporate security is a means used by a corporation to secure funds which it can employ in its business.

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'However termed', whether called stock, bonds, debentures, certificates of indebtedness, notes or what not, when issued by a corporation to obtain funds or property for use in its business, such instruments are 'known generally as corporate securities' within the meaning of the statute. *Lederer v. Fidelity Trust Co.* 267 U.S. 17, 45 S. Ct. 206, 69 L. Ed. 494; *Willcuts v. Investors' Syndicate*, supra; *Lawyers' Mortgage Co. v. Anderson*, 2 Cir., 67 F. 2d 889; *Motter v. Bankers Mortgage Co. of Topeka, Kan.*, supra; *Hamilton Nat. Bank v. United States*, 6 Cir., 99 F. 2d 570; *Central States Life Ins. Co. v. Sheean*, supra; *United States v. American Trust & Banking Co.*, 6 Cir., 125 F. 2d 113; *Pennsylvania Co. for Insurances, etc., v. Rothensies*, supra."

The attached instruments declare on their face to be a contract for the performance of certain things to be done in the future and for the payment therefor to be made in installments. There seems to be no interest conveyed in the Floral Hills Memorial Chapels, Inc., by this instrument as far as can be determined from their content.

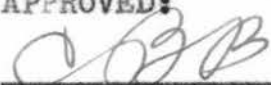
CONCLUSION

It is, therefore, the opinion of this department that the attached Provisional Covenants for memorial rites at Floral Hills Memorial Chapels, Kansas City, Missouri, do not constitute securities under the Missouri Securities Act.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

JWFab

MARRIAGE,)
FOREIGN COUNTRIES:)

A marriage between first cousins
legally performed in Italy would
be valid in Missouri.

November 16, 1951

11-20-51



The Honorable Forrest Smith
Governor of Missouri
Jefferson City, Missouri

Dear Governor Smith:

We have given careful consideration to your communication submitting a request from the Department of State for an official opinion, which request is as follows:

"The Department has received an inquiry from the American Consulate General at Naples, Italy concerning the validity in Missouri of the marriage between first cousins legally performed in Italy. The alien's wife has applied at the American Consulate General for a non-quota immigration visa to come to this country and join her husband who resides in Missouri. In considering whether a visa may properly be issued to the alien visa applicant, the Consular Officer in Naples must determine the alien's admissibility into the United States under the immigration laws.

"I would, therefore, appreciate being advised whether a marriage between first cousins legally performed in Italy would be recognized as valid in Missouri. If your answer is in the negative, I would like to be informed whether the parties to the marriage may nevertheless cohabit as man and wife in your state without being subject to possible prosecution."

The Honorable Forrest Smith

Marriage between first cousins in Missouri is prohibited under Section 451.020, RSMo 1949. The general rule, however, is that a marriage, legally contracted in any state or country, is valid everywhere.

The Supreme Court of Missouri, in the case of Johnson v. Johnson, 30 Mo. 72, 1. c. 88, said:

"It is well settled, as a general proposition, that a marriage, valid according to the law or custom of the place where it is contracted, is valid everywhere. * * *"

The same high court, in the case of Banks v. Galbraith, 149 Mo. 529, 1. c. 536, said:

"The cases decided by the courts sustaining marriages between white men and Indian women in the Indian country simply conform to an almost universal principle of international law, that a marriage celebrated in other States and countries if valid by the laws of such countries are valid in this State even though the same might by the force of our laws be invalid if contracted here. * * *"

The Supreme Court of the United States defined this principle in the case of Loughran v. Loughran, 78 L. Ed. 1219. In the course of that opinion, at page 1223, the court said:

"Marriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the State where entered into, be recognized as valid in every other jurisdiction. * * *"

Marriage between first cousins is not incestuous under the laws of Missouri as contained in Section 563.220, RSMo 1949. Neither is such marriage, legally performed elsewhere, declared void by any statute of this state.

The Honorable Forrest Smith


CONCLUSION

It is the opinion of this office that a marriage between first cousins legally performed and valid in Italy would be recognized as valid in Missouri.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

BAT/fh

COUNTY ASSESSOR:
COUNTY JUDGES:

An assessor in a county whose population is less than forty thousand need not consolidate all lands owned by one person in a square or block into one tract, lot or call; a county judge in a county of the third class must actually be present and attend court to be compensated therefor.



November 27, 1951

11-27-51

Honorable Elton A. Skinner
Prosecuting Attorney of
Howard County
Fayette, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this department. Your request reads as follows:

"1. Must the county assessor of a county of the third class having a population of less than twelve thousand consolidate all lands owned by one person in a square or block into one tract, lot or call in making assessment lists when such county has not submitted the question to a vote of the people as provided in Sections 137.225 and 137.230 R.S. Mo. 1949?

"2. Must a county court judge actually be present and attend court to be compensated therefor when such court is in session?"

The provisions relating to the assessment of property are found in Chapter 137, RSMo 1949. Section 137.215, with reference to your question, provides in part as follows:

"* * *The assessor shall consolidate all lands owned by one person in a section, and all town lots owned by one person in

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a square or block, into one tract, lot or call, when it is practicable; * * *."

Section 137.225, RSMo 1949, provides:

"* * *The assessor shall consolidate all lands owned by one person in a square or block into one tract, lot or call, * * *."

Section 137.230 RSMo 1949, exempts counties of less than forty thousand population from the provisions of Section 137.215 to 137.225, as follows:

"* * *nor shall the provisions of sections 137.215 to 137.225 apply to counties having a less population than forty thousand, unless a majority of the voters in any such county shall elect to adopt its provisions at a general election, upon the question being ordered to be submitted by the county court; * * *."

We have searched the law relating to the assessment of property and have found no provisions other than those quoted which would require such a consolidation.

Assuming the constitutional validity of this provision, we are of the opinion that the Assessor of Howard County (a county of less than forty thousand) need not consolidate lands under the provisions of Sections 137.215 and 137.225, since such sections are inapplicable unless adopted by a vote of the people as provided in this section.

You next inquire whether a county judge in a county of the third class must actually be present and attend court in order to receive compensation as provided by law.

Section 49.110, RSMo 1949, provides for the compensation of county judges in counties of the third class as follows:

"In all counties of the third class in this state, the judges of the county court shall receive for their services the sum of ten dollars per day for each of the first five days in any month that

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they are necessarily engaged in holding court and shall receive five dollars per day for each additional day in any month that they may be necessarily engaged in holding court, and shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court. The per diem compensation herein fixed shall be paid at the end of each month and the mileage compensation shall be paid at the end of each month on presentation of a bill, by each of the respective county judges setting forth the number of miles necessarily traveled; provided, however, that this increase in compensation shall not become effective during any county judge's present term of office."

It is a general rule of statutory construction that a statute fixing the compensation of public officers must be strictly construed as against the officer. This rule is stated in the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, as follows:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. * * *"

This section is clear and unambiguous and applying the rule quoted above, that a statute fixing the compensation of public officers must be strictly construed as against the officer, we are of the opinion that a county judge must be actually present and engaged in holding court in order to be compensated therefor.

CONCLUSION

Therefore, it is the opinion of this department, that an assessor in a county whose population is less than forty thousand

Honorable Elton A. Skinner


need not consolidate all lands owned by one person in a square or block into one tract, lot or call.

We are further of the opinion that a county judge in a county of the third class must actually be present and attend court to be compensated therefor.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

DDG:hr

SCHOOLS:
SCHOOLS:
ARMORIES:

Board of directors of city, town or consolidated school district cannot deed tract of land to the state for armory purposes without consideration, as board only has authority to "advertise, sell and convey" same.

January 5, 1951

1-4-51

Hon. Floyd L. Snyder, Sr.,
State Representative
Jackson County, 11th District
521 S. Noland Road
Independence, Missouri



Dear Mr. Snyder:

This is in reply to your recent request for an official opinion of this department which reads in part as follows:

"I wish that your office would furnish me an opinion as to whether it would be legal for the Independence, Missouri School district to convey to the State of Missouri for Armory purposes a tract of land here in Independence. This conveyance would be made without a money consideration.

"If this cannot be done, legally, then tell me how such a transfer can be made."

A school district may dispose of its property only in the manner provided by statute. In the case of Cape Girardeau School District v. Frye, 225 S. W. (2d) 484, the court stated at l. c. 488:

"* * * * A board of directors is but a creature of statute, and its members can exercise no authority unless the same is either expressly conferred or else arises by necessary implication from the powers that are conferred. State v. Kessler, 136 Mo. App. 236, 240, 117 S.W. 85; Consolidated School Dist. No. 6 v. Shawhan supra. * * * *"

Hon Floyd L. Snyder, Sr.,

Again, in *In re Farmers' and Merchants' Bank of Chillicothe*, 63 S. W. (2d) 829, we find the following at l. c. 830:

"The school district did not have power to sell its property or authority to dispose of its public revenue save in the manner provided in chapter 57, R. S. Mo. 1929 (section 9194 et seq. (Mo. St. Ann. Sec. 9194 et seq., p. 7066)). * * * *"

We assume that the School District of Independence is of that class as is governed by Article 5 of Chapter 72, R. S. Mo. 1939, which Article relates to city, town and consolidated schools. The only authority providing for the disposal of property by these classes of schools is Section 10471, R. S. Mo. 1939, which provides that:

"When the demands of the district require more than one public school building therein, the board shall, as soon as sufficient funds have been provided therefor, establish an adequate number of primary or ward schools, corresponding in grade to those of other public school districts, and for this purpose the board shall divide the school district into school wards and fix the boundaries thereof and the board shall select and procure a site in each newly formed ward and erect a suitable school building thereon and furnish the same; and the board may also establish schools of a higher grade, in which studies not enumerated in section 10627 may be pursued; and whenever there is within the district any school property that is no longer required for the use of the district, the board is hereby authorized to advertise, sell and convey the same, and the proceeds derived therefrom shall be placed to the credit of the building fund of such district."

(Underscoring ours)

Therefore, if the land in question is no longer required for the use of the district, it may be disposed of by the board. However, the board's authority in this regard is not unlimited, as it only has the authority to "advertise, sell and convey" same.

Furthermore, we do not feel that the words, "advertise, sell

Hon. Floyd L. Snyder, Sr.,

and convey", can in any way be construed as being disjunctive, and the presence of the word "sell" in this phrase requires that there be a consideration in the transaction of disposal. In the case of Eastern Shore Trust Co. v. Lockerman, 129 A. 915, 148 Md. 628, it was held at l. c. 918 that:

"* * * * To sell means ordinarily to transfer to another for a valuable consideration the title or the right to possess property. * * * *"

In United States v. Benedict, 280 F. 76, the court stated at l. c. 80:

"But it will not do to stop with any narrow definition of the word 'sell', which in its ordinary sense means a transfer of property for a fixed price or its equivalent. * * * *"

It has also been held that the power to sell property does not include or imply the power to give away same. Regarding this, we find the court stating in Myrick v. Williamson, 67 So. 273, 190 Ala. 485, at l. c. 275 that:

"The bill shows that the two deeds, cancellation of which is here sought, were executed without consideration to respondent, and were, in effect, a gift of the bulk of the estate to the respondent. The power to sell was, in our opinion, accompanied with a trust, and for certain purposes. There is nothing in the will which can be construed as giving to the wife a right to give away the estate. It is, we think, too plain for argument that the power to sell did not authorize such a disposition of the estate as is alleged in the bill was made by the execution of these two deeds."

In Chenault's Guardian v. Metropolitan Life Ins. Co., 53 S. W. (2d) 720, 245 Ky. 482, at l. c. 723:

"Accordingly, even where the purpose of sale and direction as to the use of the proceeds is not attached to the power, it is held that the authority to sell does not carry with it the power to make a gift of the subject-matter or convey it without consideration, and such transfer is invalid. * * * *"

Hon. Floyd L. Snyder, Sr.,

And in *Hawthurst v. Rathgeb*, 51 P. 846, 119 Cal. 531, at 1. c. 847:

"* * * * The words 'sell and transfer', as there used, are of no broader signification than the words 'sell and convey' used with reference to a conveyance of real estate, and the latter, employed as the operative words in a power to convey land, do not carry authority to mortgage or otherwise dispose of the property. * * * *"

Furthermore, the presence of the word, "advertise", in the statutory language giving the board of directors authority to dispose of land owned by the district offers further support to the proposition that the land cannot be given away. If the land could be given away, this requirement to advertise would be unnecessary and could serve no useful purpose. However, along with the authority to sell and convey, the authority to advertise serves a very reasonable and practical purpose, aiding the board of directors in effecting an expeditious and profitable disposal. We therefore feel that the requirement to advertise also necessitates a sale for a consideration, as only then could this requirement be logically justified.

In view of the above, it must be concluded in the instant case that the board does not have the authority to forthwith deed the tract of land to the State of Missouri for armory purposes, or to anyone else, without a consideration. Only by following the provisions of Section 10471, supra, may this land validly be transferred and Section 10471 does not authorize the board to give away school district property no longer required for the use of the district.

CONCLUSION

It is, therefore, the opinion of this department that the board of directors of a city, town or consolidated school district does not have the authority to forthwith deed a tract of land

Hon. Floyd L. Snyder, Sr.,

no longer required for the use of the district, to the State of Missouri for armory purposes without a consideration. The Board's only authority in this regard is to "advertise, sell and convey" such property as provided in Section 10471 R. S. Mo. 1939, which authority does not include the power to give away such property.

Respectfully submitted

RICHARD H. VOSS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL

RHV:A

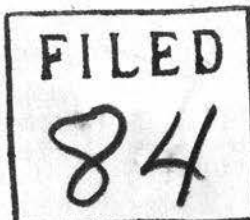
CONSERVATION COMMISSION:
FISH AND GAME:
WATERS:

Construction of Regulation 20,
Wild Life Code of Missouri, 1951.

February 26, 1951

2-28-51

Honorable LeRoy Snodgrass
Prosecuting Attorney
Miller County
Tuscumbia, Missouri



Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads:

"Ever since the Conservation Commission restricted the taking of fish, minnows, and crayfish in or from waters within seventy-five yards of Bagnell Dam, Miller County, Missouri, considerable ill will has developed toward the Conservation Commission and their representatives. This ill feeling has developed mostly from the failure to inform the general public as to the correct interpretation of the law relative thereto, resulting in arrests at one time for an act condoned or tolerated shortly before.

"I would like to have your opinion in regard to fishing below Bagnell Dam, to wit: Whether or not a person on the bank or in a boat outside the seventy-five yard restricted area can take fish from the waters of the Osage legally even though his line and hook are drifted by the under-current within a distance less than seventy-five yards from the Dam proper. The fish in such instances are taken from the water below the seventy-five yard restricted area, the fisherman is below the seventy-five yard restricted area, but the line and hook are above and within the restricted area. Whether the line and hook are above is not a certainty, but in your opinion on this matter, please assume they are above and within the seventy-five yard restricted area."

Honorable LeRoy Snodgrass

Section 40(a), Article IV of the Constitution of Missouri, 1945, vests in the Conservation Commission full control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wildlife resources of this state, and reads:

"The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto, shall be vested in a conservation commission consisting of four members appointed by the governor, not more than two of whom shall be of the same political party. The members shall have knowledge of and interest in wildlife conservation. The members shall hold office for terms of six years beginning on the first day of July of consecutive odd years. Two of the terms shall be concurrent, one shall begin two years before and one two years after the concurrent terms. If the governor fail to fill a vacancy within thirty days, the remaining members shall fill the vacancy for the unexpired term. The members shall receive no salary or other compensation for their services as members, but shall receive their necessary traveling and other expenses incurred while actually engaged in the discharge of their official duties."

Section 45 of the same article further provides that rules and regulations of said Commission, not relating to its organization and internal management, become effective not less than 10 days after being filed with the Secretary of State as provided in Section 16 of the same article of the Constitution, which provision applies alike to all boards and administrative agencies of the executive department of the state. Said section 45 reads:

"The rules and regulations of the commission not relating to its organization and internal management shall become effective not less than ten days after being filed with the

Honorable LeRoy Snodgrass

Secretary of State as provided in section 16 of this article, and such final rules and regulations affecting private rights as are judicial or quasi-judicial in nature shall be subject to the judicial review provided in section 22 of article V."

The particular regulation questioned herein is Section 20, adopted by the Conservation Commission and duly filed with the Secretary of State, which reads:

"Unless otherwise provided by this code, fish may be taken with the aid of rods, trotlines, throw lines, limb lines, jug or block lines, poles and lines, floats, sinkers, artificial lures, hooks, bait except game fish, and boats or other floating craft propelled by hand, sail or motor; but no fish may be taken or attempted to be taken by means of 'noodling' or rock or hand fishing, with or without hook. No tackle or device may be used to snag or snare fish at any time, except that gar may be snared at any time, and that carp, carpsucker, redhorse, sucker, buffalo and spoonbill may be grabbed and snared between April 15 and May 15 next thereafter. Not more than three (3) poles may be used by any person at one time. Not more than thirty-three (33) hooks in the aggregate, for any or all such methods, may be used by any person at any one time. Hooks attached to trotlines or throw lines shall be staged not less than two (2) feet apart. Trotlines may not be attached or tied together by one or more parties and thereby extend the number of hooks permitted. In or from the waters within seventy-five (75) yards below Bagnell Dam in Miller County, Clearwater Dam in Reynolds and Wayne Counties, Powersite Dam in Taney County, and Wappapello Dam in Wayne County, no fish, minnows or crayfish may be taken at any time. No bank lines, throw lines, trotlines or boats may be used at any time to take fish from any water within seven hundred (700) feet (the chute) below the spillway wing walls of Lakes Wappapello and Clearwater."

Honorable LeRoy Snodgrass

Your request in no manner questions the validity of Section 20, supra, but you merely inquire as to a construction of said provision. It prohibits the taking of fish, minnows and crayfish in or from the waters within 75 yards below Bagnell Dam in Miller County, Missouri, at any time. Taking has been defined by said Commission for the purpose of the Wildlife Code and its application as follows:

"TAKE OR TAKING: Includes killing, trapping, snaring, netting or capturing in any manner, any wildlife of the state, and also refers to any lesser acts, such as pursuing, molesting, hunting, wounding; or the placing, setting, drawing or using any net, trap, device, contrivance or substance in an attempt to take; and every act of assistance to every other person in taking or attempting to take any of said resources if further referred to and included. Whenever 'taking' is permitted by this code, it shall be construed that such taking shall be in accordance with this code."

While said regulation may be somewhat ambiguous, in view of the foregoing regulations prohibiting the taking of fish in or from the waters within 75 yards of said Dam at any time and defining taking for purposes of said Wildlife Code and its application, we think it can only be construed in one manner. The regulation is not against one fishing within that distance, but is against the taking of fish in or from said waters. Apparently many persons have been confused, thinking the regulation was against fishing therein. However, it is against taking the fish.

The primary rule of construction of constitutional provisions, statutes and ordinances is to ascertain and give effect to the intention of the Legislature, if possible, from words used and to promote its object and manifest purpose. See *Union Electric Co. v. Morris*, 222 S.W. (2d) 767, 359 Mo. 564; *City of St. Louis v. Pope*, 126 S.W. (2d) 1201, 344 Mo. 479. We are of the opinion that the foregoing rule likewise applies to rules and regulations adopted by the Conservation Commission of the State of Missouri. There is another well established rule that interpretations placed upon the laws by governmental agencies charged with their enforcement are not binding on the courts, but they are entitled to serious consideration by the courts and by those whose activities are

Honorable LeRoy Snodgrass

subject to the law. Wiley v. Stewart Sand & Material Co.,
206 S.W. (2d) 362.

It is evident that the Conservation Commission has always considered the practice of taking fish as referred to in your request below Bagnell Dam subsequent to the adoption of the foregoing Regulation 20 as illegal and in violation of said regulation. Certainly in adopting that Regulation, it was the intent of that body that no one should take fish from the waters by any means within 75 yards of said Dam.


CONCLUSION

Therefore, it is the opinion of this department that Regulation 20 of the Wildlife Code of Missouri, 1951, promulgated by the Conservation Commission and duly filed with the Secretary of State prohibits the taking of fish in the manner referred to in your request, in or from the waters within 75 yards of Bagnell Dam, Miller County, Missouri.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

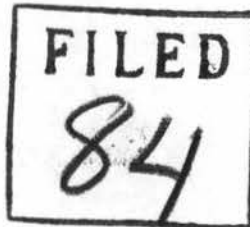
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OFFICERS:

A public administrator in a county of the third class may also serve as deputy to county collector.

February 28, 1951

3-1-51



Honorable LeRoy Snodgrass
Prosecuting Attorney
Miller County
Tuscumbia, Missouri

Dear Sir:

This is in reply to your request for an opinion which reads as follows:

"I would like to have your opinion on the question whether or not a Public Administrator upon being appointed deputy to County Collector and assumes duties of deputy collector is thereby disqualified to retain his office as Public Administrator in a county of the Third Class.

"This question has come before me and it is my opinion that section 52.310, Revised Statutes, 1949, precludes the acceptance of appointment as Deputy Collector and retention of the office of Public Administrator."

Section 52.310, RSMo 1949, provides as follows:

"No collector or holder of public moneys, or any assistant or deputy of such holder or collector of public moneys, shall be eligible or appointed to any office of trust or profit until he shall have accounted for and paid over all sums for which he may be accountable."

The Supreme Court of Missouri in the case of State ex inf. v. Breuer, 235 Mo. 240, in holding that a county collector could

Honorable LeRoy Snodgrass

be elected to the office of circuit judge before he had accounted for and paid over all sums of money for which he was accountable construed Section 19, article 2 of the Constitution of 1875 and Section 11446, R. S. Mo. 1909:

"Section 19, article 2 of the Constitution of this State is as follows: 'Collectors, Receivers, etc., in Default, Ineligible to Office. That no person who is now or may hereafter become a collector or receiver of public money, or assistant or deputy of such collector or such receiver, shall be eligible to any office of trust or profit in the State of Missouri under the laws thereof, or of any municipality therein, until he shall have accounted for and paid over all the public money for which he may be accountable.'

"And section 11446, Revised Statutes 1909, provides: 'No collector or holder of public moneys, or any assistant or deputy of such holder or collector of public moneys, shall be eligible or appointed to any office of trust or profit until he shall have accounted for and paid over all sums for which he may be accountable.'"

It is noted that Section 11446, R. S. Mo. 1909 is identical to Section 52.310, RSMo 1949.

In the above cited case, at l.c. 249, the court said:

"It will be noticed that the catch-words of the section of the Constitution are: 'Collectors, receivers etc., in default, ineligible to office.' And the general rule of law upon the subject, as stated in 29 Cyc. 1385, is as follows: 'Statutes frequently disqualify for public office those who, having in their possession public funds, are in default. Such statutes disqualify only those who have been determined by legal authority to be in default, or admit that they are in default, and appear generally to be liberally construed in favor of eligibility to office. Thus "default" is said to mean a willful and corrupt omission to pay over funds.'

Honorable LeRoy Snodgrass

"The reasonable and salutary interpretation given to the Constitution and statutory provisions under consideration, by this court, is not that those holding the offices mentioned shall be treated as in default and denied further political preferment while occupying such office, but rather that the door of the same office for another term, or of another office, shall be barred to them until, and only until, they shall have shown themselves eligible and worthy by a full settlement and payment of all public funds in their hands."

Although Section 52.310 RSMo 1949 must be construed without the aid of a constitutional provision similar to the one quoted, it is felt that its interpretation and effect should be the same.

The general principle of law relating to whether a person may at the same time hold two public offices is found in Corpus Juris, Volume 46, page 941, et seq:

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment."

The leading case in Missouri is State ex rel. v. Bus, 135 Mo. 325, 1. c. 338, wherein the court in discussing this question said:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those

Honorable LeRoy Snodgrass

of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

"It was said by Judge Folger in People ex rel. v. Green, 58 N. Y. loc. cit. 304:

"Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law."

We have examined the statutes relative to the duties of a public administrator and deputy collector in counties of the third class and we are of the opinion that the duties are not incompatible and do not conflict so as to prevent the same person from acting as deputy county collector and also as public administrator.

Honorable LeRoy Snodgrass


CONCLUSION

Therefore, it is the opinion of this department that a public administrator in a county of the third class may also serve as deputy to county collector.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

DDG:hr

TOWNSHIP)
ASSESSORS) The county court, as such, has no power of supervision
over the township assessors in counties under township
organization. But the county board of equalization has
ample authority to adjust the assessments to meet the
standards of true value.

April 11, 1951

Mr. Ronald L. Somerville
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

4-12-51
FILED

84

Dear Mr. Somerville:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"This letter is being written upon the request of the County Court of Livingston County, Missouri.

"Briefly, the problem confronting the County Court is this: some of the township assessors, for example, have been making proper and complete assessments; others, have left many items of property off of the assessment sheets. For example, several of the assessors have failed to list any chickens or small grains on any of the tax assessment lists for their entire township. Some assessors are listing new cars at the valuation suggested by the State Board of Equalization. Assessors in other townships are listing the identical makes of cars at less than half of the suggested value. It goes without saying that discrepancies such as I have described here in the various assessment books is causing ill feeling and dissatisfaction. Certainly it isn't fair for a heavier tax burden to be placed upon one township merely because their assessor tries to conscientiously do his job while in another township, the tax burden is considerably lighter due to the

Mr. Ronald L. Somerville

fact that the assessor in that township has done a poor and incompetant job of making an assessment.

"As far as I could determine from the statutes, about the only authority the County Court has over the township assessor is by way of sitting as a Board of Equalization. Specifically, the County Court of Livingston County desire to know whether or not there is some type of control that they can exercise over the township assessor to rectify the discrepancies brought about where certain items of taxable property are left off of the assessment list."

The duties of township assessors in counties under township organization are defined in Sections 137.425 to 137.480, inclusive, RSMo 1949, and described specifically in regard to assessments of property in Section 137.440, as follows:

"The assessor or some suitable person empowered by him, shall, within the time prescribed by law, and after being furnished with the necessary blanks proceed to take a list of the taxable property of his township and assess the value thereof in accordance with the provisions of the general laws of this state in relation to the assessment of real and tangible personal property by county assessors, in all things pertaining to the discharging of his official duties, except when the same may be inconsistent with the provisions of this chapter; provided, that in counties under township organization the assessor shall not be required to give bond and his compensation shall be such as is provided in section 65.240, RSMo 1949, for his services."

The county court, as such, has no right to exercise control over the functions of the township assessors. But the county board of equalization, described in sections

Mr. Ronald L. Somerville

138.010 to 138.080, inclusive, RSMo 1949, has ample authority to accomplish such purpose. The board has full power to equalize the valuations and adjust the assessments to meet the standards of true value. This authority is definitely set out in Sections 138.030 and 138.050, as follows:

Section 138.030

"1. The members of the county board of equalization shall each take an oath, to be administered by the clerk, to fairly and impartially equalize the valuation of all taxable real estate and tangible personal property in the county.

"2. Said board shall have the power and the duty to hear complaints and to equalize the valuation and assessments upon all taxable real and tangible personal property within the county so that all such property shall be entered on the tax book at its true value; provided, that said board shall not reduce the valuation of the real or tangible personal property of the county below the value thereof as fixed by the state tax commission."

Section 138.050

"The following rules shall be observed by county boards of equalization:

"(1) They shall raise the valuation of all tracts or parcels of land and all tangible personal property as in their opinion have been returned below their real value; but, after the board has raised the valuation of such property, it shall give notice of the fact, specifying the property and the amount raised, to the persons owning or controlling the same, by personal notice, or through the mail if address is known, or if address is unknown, by notice in one issue of any newspaper published within the county at least once a week, and that

Mr. Ronald L. Somerville

said board shall meet on the second Monday in August, to hear reasons, if any be given, why such increase should not be made; the board shall meet on the second Monday in August in each year to hear any person relating to any such increase in valuation;

"(2) They shall reduce the valuation of such tracts or parcels of land or any tangible personal property which, in their opinion, has been returned above its true value as compared with the average valuation of all the real and tangible personal property of the county."

The board also has power to assess any property that may have been omitted by the assessors. This authority is embodied in Section 138.070, the first paragraph of which is as follows:

"1. The county board of equalization, in regular session, shall have authority to assess and equalize the value of any property that may have been omitted from the assessor's books then under examination by said board, and in case the board shall add any property to the assessor's books, it shall cause notice in writing to be served upon the owner of such property, stating the kind and class of property and the value fixed thereon by said board, and naming the time and place, not less than five days thereafter, when and where such owner may appear before the board and show cause why said assessment should not be made."

CONCLUSION

It is the opinion of this office that the county court, as such, has no power of supervision over the township assessors


Mr. Ronald L. Somerville

in counties under township organization. But the county board of equalization is vested with ample authority to adjust the assessments to meet the standards of true value and uniformity.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

BAT/feh

AGRICULTURE:
DAIRY PRODUCTS:

A regulation requiring vehicles transporting milk to be covered and insulated is not compatible with paragraph 3 of Section 196.585, RSMo 1949.

March 26, 1951

3-27-51

Honorable Joseph T. Stakes
Director of Dairy Division
Department of Agriculture
State of Missouri
Jefferson City, Missouri

FILED

85

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

"An opinion is requested as to whether the Commissioner of Agriculture--empowered with the authorization for promulgating regulations--in accordance with Section 196.555 RSMo 1949--could prescribe a regulation under Section 196.585 RSMo 1949, Paragraph 3, requiring vehicles transporting milk to be covered and insulated.

"Section 196.585 RSMo 1949, Paragraph 3, requires that all vehicles used for the transportation of dairy products must be clean and sanitary. Many dairy products manufacturing plants engaged in the procurement of milk from farm to market require Route Haulers to equip their trucks with covered and insulated beds.

"It is felt that open trucks are conducive to extraneous matter getting into the milk and, also, open trucks are used to haul feed, fertilizers, and other items back on the milk route.

"It has been the observation of this Division during the past several years that plants which require covered vehicles show

Honorable Joseph T. Stakes

the lowest percentage of rejectionable milk, based on sediment or extraneous matter content.

"It is further believed that the dairy farmers who produce milk for manufacturing purposes are deserving of such protection of their milk from farm to market, and that the protection from road dust can best be provided with covered vehicles."

Section 196.555, RSMo 1949, states:

"The commissioner is hereby authorized, after investigation and public hearing, to prescribe and promulgate such reasonable regulations, not contrary to the purposes of sections 196.520 to 196.690, as are necessary to carry out the intent or to enforce said sections."

Section 196.585, RSMo 1949, Paragraph 3, states:

"All milk and cream cans shall be thoroughly washed, sterilized, and free from rust before being used for milk or cream, and shall be thoroughly dry before lids are affixed and empty cans shipped. All vehicles used for the transportation of dairy products must be clean and sanitary. Whenever dairy products are transported in the same vehicle with livestock, poultry, hides, furs or any other article of similar nature, or any product or thing likely to contaminate or injure the quality of said dairy products, said dairy products must be either separated from the other articles by a solid partition or a heavy water-proof canvas, or loaded and carried apart and above such other contaminating article or thing. Milk and cream, while being transported, either by the producer or the purchaser, shall be protected by wet sacks, tarpaulins, blankets, or by such other means as will keep said product in a reasonably cool condition."

Honorable Joseph T. Stakes

The question which you propound is whether, under the authority given to the Commissioner of Agriculture by Section 196.555, supra, to promulgate regulations, he could, legally, in view of Paragraph 3 of Section 196.585, supra, promulgate a regulation requiring vehicles transporting milk to be covered and insulated.

A sentence by sentence analysis of Paragraph 3 of Section 196.585, supra, leads us to conclude that the Commissioner would not be authorized, by anything contained in the aforesaid portion of the aforesaid section, to promulgate the proposed regulation. The first sentence of Paragraph 3 relates wholly to the condition of the milk and cream containers. The next sentence states that "All vehicles used for transporting of dairy products must be clean and sanitary." This would appear to give the Commissioner wide latitude, but the sentence following contemplates, and allows, under certain specified physical conditions, the transportation in a vehicle transporting dairy products, the simultaneous transportation of livestock, poultry, hides, furs, and other articles of a similar nature. If the law allows this, as it does, it obviously believes that the simultaneous transportation of the above listed, and similar, articles, in a vehicle transporting dairy products, will not, under the physical conditions prescribed, prove harmful to the dairy products. It would appear that for the dairy products to be in an open, un-insulated vehicle, would be less harmful than would the presence of the articles mentioned, and that, therefore, such truck coverage and insulation as is proposed by the regulation proposed would be outside the contemplation of Paragraph 3 of Section 196.585, supra. The final sentence of Paragraph 3 refers only to the immediate conditions surrounding the containers of milk and cream during transportation.


CONCLUSION

A regulation requiring vehicles transporting milk to be covered and insulated is not compatible with Paragraph 3 of Section 196.585, RSMo 1949.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

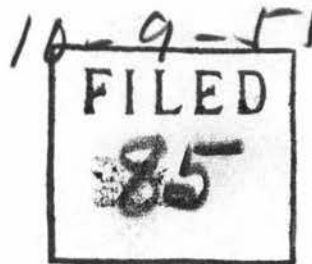
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MAGISTRATE COURT:
HABEAS CORPUS:

Application for a writ of habeas corpus should not be made to a magistrate court when a circuit judge is available, and that application for such a writ to a magistrate court must state that no circuit judge is available.

October 8, 1951

Honorable O. Hampton Stevens
Assistant Prosecuting Attorney
Jackson County
Courthouse
Kansas City, Missouri



Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

"Our office would like an official opinion on the right of a Magistrate to grant a Writ of Habeas Corpus.

"Apparently, the statute governing the right of a Judge of the Magistrate Court to issue a Writ of Habeas Corpus is Sect. 1658, Art. 6, Writ of Habeas Corpus, Rev. Statutes 1939. (Sect. 532.030, 1949.) The caption of this section is, 'Application, to what court first made.' The pertinent part of this section of the statute reads as follows:

"When a person applies *** his application, in the first instance, shall be to the judge of the Circuit Court for the County in which the applicant is held in custody, if, at the time of the application, such judge be in the County ***."

"It is our opinion that an application for a Writ of Habeas Corpus cannot be made to a Magistrate's Court in Jackson County, unless the application sets out that none of the Circuit Court judges are present in the county at the time the application is made. (We have ten divisions of our Circuit Court.) We

Honorable O. Hampton Stevens

believe the opinion of the Supreme Court in Banc. Ex Parte Hagan, 245 S.W. 336, which case interprets the above statute, and that the language of the opinion should be governing on this point. We quote L.C. 337--

"It should be said that Sect. 1944, R.S. 1919, really contemplates that if the Circuit Judge is in the County, application should not be made for the writ to an inferior court rather than to the Circuit Judge. This, on the theory that it would be a reasonable regulation to require application to a superior court rather than an inferior court, if a Judge of the superior court was at hand."

"We would appreciate your advice on this subject."

We will first state that it is our belief that a magistrate court has the power to issue a writ of habeas corpus. We have so held in an opinion issued to Honorable H. A. Kelso, Prosecuting Attorney of Vernon County, on July 23, 1946, a copy of which opinion is enclosed.

We assume from your letter that you do not question the power of a magistrate court to issue this writ, but that you do ask us to decide whether, when an application for the writ is made to a magistrate court, the application must state that no circuit judges in the county are available to entertain the application. In regard to this matter, we direct your attention to the following portion of Section 532.030, RSMo 1949:

"When a person applies for the benefit of this chapter, who is held in custody on a charge of crime or misdemeanor, his application, in the first instance, shall be to the judge of the circuit court for the county in which the applicant is held in custody, if, at the time of the application, such judge be in the county, except that in the city of St. Louis the application, in the first instance, shall

Honorable O. Hampton Stevens

be made to the judge of the St. Louis court of criminal correction, if he, at the time of the application, shall be in said city;
* * *

Prior to 1922, numerous cases held that the above section, which has been in force in Missouri for many years, in substantially its present form, meant that application for a writ of habeas corpus was always to be made first to the circuit judge, rather than to a superior court, if the circuit judge was available. Two of these cases, Ex parte Joseph Gaume, Petitioner, 162 Mo. 390, and Ex parte James Shoffner, 173 Mo. App. 403, the first being decided in the Missouri Supreme Court and the second in the Springfield Court of Appeals, held that those courts were without power to issue a writ of habeas corpus because the application made to them did not state that the circuit judge was not available. However, in 1922, the Missouri Supreme Court, in the case of Ex parte Hagan, 245 S.W. 336, put a different interpretation on what is now Section 532.030, RSMo 1949. In this case the petitioner applied to the Missouri Supreme Court for a writ of habeas corpus, which writ was granted. Subsequently a motion was filed to quash the writ of habeas corpus issued by the Missouri Supreme Court on the ground that the court was without jurisdiction. In overruling this motion the court stated, in part, l.c. 337:

"I. We have first a motion to quash our writ. Of recent years this motion is novel, to say the least. It has, however, foundation both in statute and decisions. Singular as it may seem, plain constitutional provisions are sometimes overlooked by the courts. In the grant of power to this court the Constitution (section 3, art. 6) says:

"The Supreme Court shall have a general superintending control over all inferior courts. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial writs, and to hear and determine the same."

"(1) This constitutional power to issue the writ is absolute. It is a grant of original and concurrent jurisdiction. There is no qualification or restriction in the organic law. Without a restriction in the organic law, the Legislature is without power to limit our jurisdiction. Our jurisdiction

Honorable O. Hampton Stevens

is one of a broad and unrestricted constitutional grant and a legislative restriction would be violative of this grant.

"We must concede that section 1944, R.S. 1919 (a statute upon the books for years), seemingly undertakes to restrict the original jurisdiction of this court, as such is given by the Constitution."

* * * * *

"Without discussion, this statute, as a restriction upon the prerogatives of this court, has been enforced in certain cases. Ex parte Gaume, 162 Mo. 390, 62 S.W. 984; Ex parte Shoffner, 173 Mo. App. 403, 158 S.W. 853. The Gaume Case from this court has never been cited since, except in 173 Mo. App. 403, 158 S.W. 853, and in State v. Buckner (Mo. Supp.) 234 S.W. loc. cit. 652, so far as we find, in the latter, with nothing but a limited approval. It is true that the statute and the Gaume case, supra, sustain the contention of the respondents in this case. The Gaume Case, from its face, shows that the real question was not raised or considered. In the early case of Ex parte Bethurum, 66 Mo. loc. cit. 553, the unrestricted right of this court to issue the writ is recognized, and the right of the lawmakers to destroy this right is also denied."

* * * * *

"Under the Constitution, this court is given the right to grant writs of habeas corpus. No legislative act can take away or curtail this constitutional grant. It would be useless for the people (in the Constitution) to grant this court a right, if the Legislature could later destroy the right. What is granted by the Constitution cannot be curtailed or destroyed by legislative act.

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"It should be said that section 1944, R.S. 1919, really contemplates that if the circuit judge is in the county, application should not be made for the writ to an inferior court, rather than to the circuit judge. This on the theory that it would be a reasonable regulation to require application to a superior court rather than an inferior court if a judge of the superior court was at hand. This principle is far different from that of cutting down an original and concurrent jurisdiction in a superior court. Of recent years we have recognized the unrestricted right of this court, in the exercise of its constitutional right, to issue and hear these writs."

The above case was cited with approval by the Missouri Supreme Court in 1929, in the case of State vs. Rudolph, 17 S.W. 2d 932, 1.c. 934.

It will be observed that the Hagan case states, by way of dictum, that if the circuit judge is in the county at the time application for the writ is made, that the application should be to him rather than to an inferior court. The case of Ex parte Hagan, supra, overrules the cases of Ex parte Joseph Gaume, supra and Ex parte James Shoffner, supra, only insofar as the jurisdiction of the Supreme Court and the courts of appeals are concerned.

We would here call attention to Section 4, Article V of the Constitution of Missouri, which states:

"The supreme court, courts of appeals, and circuit courts shall have a general superintending control over all inferior courts and tribunals in their jurisdictions, and may issue and determine original remedial writs."

It will be observed that magistrate courts are not courts named as ones having jurisdiction to issue remedial writs, of which habeas corpus is one. Therefore, the right and jurisdiction must be shown.

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In view of all of the above, it is our belief that an application to a magistrate court for a writ of habeas corpus should state the unavailability of a circuit judge for that purpose.

CONCLUSION

It is the opinion of this department that application for a writ of habeas corpus should not be made to a magistrate court when a circuit judge is available, and that when an application for a writ of habeas corpus is made to a magistrate court, it should state the unavailability of a circuit judge for the purpose of entertaining the application.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

HPWab

Enclosure.

SOCIAL SECURITY:
OFFICIAL COURT REPORTER:

Circuit
~~An official~~ court reporter for
the purpose of the Social Security
Law is an employee of the county
or counties from whom he derives
his compensation.

August 28, 1951

8-29-51

Honorable H. K. Stumberg
Prosecuting Attorney of
St. Charles County
St. Charles County, Missouri



Dear Sir:

Reference is made to your recent request for an official
opinion of this department which request reads as follows:

"I would like very much to have an
official opinion from your office on the
following questions:

- "1. Is the Official Court Reporter
considered a state officer within the
meaning of the law relative to social
security?
- "2. Where the court reporter's circuit
comprises more than one county, does each
of the several counties have to accept the
Act before he can qualify with the govern-
ment under the Act?
- "3. Would the answer to No. 2 be any different
if any one county failed to comply where the
others did, i.e.,
- "4. Would the total monthly withheld payments
be reduced because of the failure of one county
to accept the Act and, if so, would the pro-
portionate part of his salary derived from the
county which did not accept the Act be the
determining factor?"

Your questions require an interpretation of Senate Com-
mittee Substitute for Senate Bill No. 3 of the Sixty-Sixth General

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Assembly with regard to the status of an official court reporter. You first inquire whether the official court reporter is a state officer within the meaning of this act. Section 2, subsection 3, of Senate Bill No. 3 provides for the coverage of state employees as follows:

"All services which constitute employment as defined in section 1 and are performed in the employ of the state by employees of the state shall be covered by the agreement."

(Underscoring ours.)

The term employee is defined in Section 1, subsection 2 to include state officers as follows:

"'Employee', elective or appointive officers and employees of the state, including members of the general assembly, * * *."

(Underscoring ours.)

The term state officer is not defined in Senate Bill No. 3, therefore we must look to the generally accepted rules for determining who is a state officer so far as they are consistent with the purposes of the act.

In the case of State ex rel. Scobee v. Meriwether, 200 S. W. (2d) 340, the Supreme Court of Missouri was called upon to decide whether an official court reporter was a public officer within the meaning of Article VII, Section 13 of the 1945 Constitution of Missouri. In discussing this question the court in its opinion said:

"'It is not possible to define the words 'public office or public officer.' The cases are determined from the particular facts, including a consideration of the intention and subject-matter of the enactment of the statute or the adoption of the constitutional provision.' State ex inf. McKittrick, Attorney General, v. Bode, 342 Mo. 162, 113 S.W. (2d) 805, loc. cit. 806."

The court, after extensive review of the statutes relating to official court reporters considered in connection with the usual rules for determining who is a public officer, reached the following conclusion:

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"When the various elements of a public office and the characteristics of a public officer are considered in connection with our statutes dealing with an official court reporter, he is not a public officer but an employee * * *."

(Underscoring ours.)

We believe that nothing in the provisions of Senate Bill No. 3 would constrain us to hold that an official court reporter is a state public officer notwithstanding the reasoning applied in the above cited case. Therefore, we are of the opinion that an official court reporter is not a state officer within the provisions of Senate Bill No. 3 and covered as such; however, this conclusion does not preclude an official court reporter from being covered as an employee, either of the state or of a county or counties.

Section 485.040, RSMo 1949, provides for the appointment of official court reporters by the judges of the circuit courts. Section 485.050 prescribes the duties of duly appointed court reporters. Section 485.060 provides for the compensation and method of payment of such reporters in judicial circuits having a population of 45,000 and less than 60,000 inhabitants and reads in part as follows:

"* * * where a judicial circuit is composed of more than one county, such salary shall be divided among the counties and be paid by them proportional as the population of such counties bears to the entire population of the circuit; * * *."

We are of the opinion under the authority of State ex rel. Scobee v. Meriwether; the above cited section, and a consideration of Senate Bill No. 3, that an official court reporter is an employee of the county or counties by whom his compensation is paid, for the purpose of this act.

In the case of Shamburger et al. v. Commonwealth et al., 240 SW (2d) 636, the Court of Appeals of Kentucky was called upon to decide whether certain officers, i. e. (sheriff, clerk of the county court, clerk of the circuit court, etc.), their deputies and assistants, who were receiving their compensation from the state, were employees, for the purpose of the Social Security Act, of the state or county. The court in reaching its decision disregarded the usual rules for determining the employer-employee relationship and based their decision upon the source of compensation, and said:

"The Social Security Act contemplates an employer-employee relation. Strictly speaking

that is not the relation between a government and its elected officer. But for purposes of the Social Security Act, 'The term "employee" includes an officer of a State or political subdivision.' 42 U.S.C.A., Section 418(b) (3). By Ch. 1, Sec. 2(c), acts of 1951, Extraordinary Session, the term is deemed to include both 'elective and appointive officers of the Commonwealth, political subdivisions, or interstate instrumentalities.' This observation is made in the light of argument as to whether the state or the county has control over these officers, and some statement about the right to 'hire and fire,' which is often regarded as establishing the employer-employee relationship. There is some complication in the fact that the officers to which the present controversy relates render dual or triple services--to the Commonwealth, to the county, and to individuals who may or may not be citizens of either the state or county, and collect fees from all of them.

"The fundamental point, it seems to us, is the fact that contributions (or excise taxes) required by the law to be paid by both employers and employees, is a percentage of wages or compensation paid and received. 26 U. S. C.A., Sections 1400, 1410. Therefore, so far as liability for payment is concerned, the controlling point is the source of compensation, i.e., who pays the salaries."

(Underscoring ours.)

Therefore, for the purpose of Senate Bill No. 3, an official court reporter would be considered an employee of each county from whom he derives compensation and would qualify for coverage when the county accepted the provisions of Senate Bill No. 3 and enters into an agreement covering its officers and employees.

We do not deem it necessary to pass upon questions 2, 3 and 4, since the three counties comprising your judicial circuit have accepted the provisions of Senate Bill No. 3.

Conclusion

Therefore it is the opinion of this department that for the purpose of coverage under the Social Security law, an official court reporter of a judicial circuit comprised of three counties is an employee of each county to the extent that such county


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contributes to his compensation.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

DDG:hr

PROBATE JUDGE:

SALARY:

The estate of a Probate Judge who dies in office is not entitled to compensation as salary incident to such office between the date of the death of such Judge and the date of the appointment of a successor to him. Neither is the newly appointed Judge entitled to compensation between the date of the death of the previous Judge and the date of his appointment. Any balance of such salary unused constituting a part of excess fees collected by the Probate Judge should be paid into the school fund of such county.

January 27, 1951

2-3-51
FILED

88

Honorable H. Tiffin Teters
Assistant Prosecuting Attorney
Jasper County
Carthage, Missouri

Dear Mr. Teters:

We are hereby supplying the opinion you requested in your letter of January 6, 1951. Your letter follows:

"Will you please render an opinion of the following state of facts at your earliest convenience as it is necessary that the Probate Judge of Jasper County, Missouri make a final report for the year 1950.

"On February 24, 1950, Judge Grant Emerson, Probate Judge of Jasper County, Missouri, died and the office of Probate Judge became vacant. On the 2nd day of March, 1950, Judge Elza Johnson was appointed Probate Judge by the Governor of the State of Missouri to fill the vacancy thereby created. Judge Johnson was sworn in and assumed the duties of office on the 3rd day of March, 1950, and of course, thereafter performed the duties of the Probate Judge, including unfinished reports and accumulated business of the Court during the period of vacancy.

"Judge Johnson served the remainder of the year 1950 but was not reelected and on the 1st day of January, 1951, his successor was sworn into office. The

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County Auditor paid to Judge Emerson and his estate the proportionate part of the annual salary he had earned for the year 1950, including the date of his death, February 24, 1950. The County Auditor has also paid or caused to be paid to Judge Johnson the proportionate part of the annual salary from the date he was sworn in on March 3, 1950, until the end of the year. That part of the annual salary from February 24, 1950, to and including March 2, 1950, has not been paid.

"Laws of 1945, page 1514, provide that the annual salary of Probate Judges in counties now or hereafter having 70,000 and less than 250,000 inhabitants shall be \$6,000.00.

"It is contended by Judge Johnson that the salary is not a per diem salary but an annual salary and that the full \$6,000.00 has not been paid and as he is holding the legal title to the unexpired term either he or the estate of Judge Emerson is entitled to this salary between February 25, 1950 and March 2, 1950.

"In other words he is requesting how and to whom the unpaid part of said annual salary should be paid or would it go into the school funds of the County.

"Judge Johnson contends that salary paid for holding public office is an incident to the legal title to such office regardless of services rendered or how many days he is actually engaged in performing the duties of that office. He claims that he was appointed to serve the unexpired term of the former judge and he should be entitled to the unpaid part of the annual salary and the fact that he did not

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actually serve from February 25, 1950, to March 2, 1950, both inclusive, does not deprive him of the right to such compensation.

"He cites the following authorities for his contention:

46 C.J. 1014 Sec. 233	
Cunio vs. Franklin County,	315 Mo. 405, Lc407
State vs. Gordon	245 Mo. 12 Lc 27
King vs. Riverland	218 Mo. A. 490 Lc 493
Stratton vs. Warrensburg	167 SW2d 392 Lc 396
Luth vs. Kansas City	203 Mo. A. 110 Lc 113
State vs. Walbridge	153 Mo. 194 Lc 204
State vs. Gordon	245 Mo. 12 Lc 28-29

"Will you please advise this office as to your ruling in regard to this matter and whether the annual salary from February 25, 1950, to March 2, 1950, both days inclusive, should be paid to the estate of Judge Grant Emerson, to Judge Elza Johnson, or whether the same should be placed in the school funds of Jasper County, Missouri, as unexpended funds of the office of the Probate Court.

"We will thank you for an early reply as the annual report for the year 1950 cannot be completed until we get a ruling on this matter."

The question you submit is whether the estate of a former Probate Judge of Jasper County who died during his term of office, is entitled to the salary between the date of his death, February 24, 1950, and March 3, 1950, when the Governor appointed a Probate Judge to fill the vacancy, or whether the Probate Judge, who was appointed March 3, 1950, to fill the vacancy is entitled to compensation for the period of the vacancy, and if neither the estate of the deceased Judge, nor the appointed Judge,

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is entitled to compensation should the estimated amount of such part of the annual salary of the Probate Judge computable during such vacancy be placed in the school fund of Jasper County, Missouri, as unexpended funds of the annual salary of the Probate Judge.

The official manual of Missouri, popularly called the "Blue Book", page 750, lists Jasper County as having a population of more than 70,000 inhabitants, and as a second class county under the Constitution and statutes of this State.

Under the title of "Salaries and Fees" of Judges of Probate Courts in counties having more than 30,000 inhabitants, Section 3, page 1515, Laws of Missouri, 1945, reads as follows:

"The annual salary of probate judges in counties now or hereafter having 70,000 and less than 250,000 inhabitants shall be \$6000.00."

Section 5 of said Act, l.c. 1515, provides, among other things, that such Probate Judges shall be paid their salaries monthly by the counties in which they serve. Said Section 5, in part, so providing, reads as follows:

"In all counties now or hereafter having more than 30,000 inhabitants, the probate judges shall appoint their own clerks, assistants and stenographers, and shall determine their number and their salaries by order of record, and may remove them when in the discretion of such judges it is deemed advisable. All salaries of such judges and their appointees shall be paid monthly by the county, upon requisition issued by the judge of such court. * * *."

It will be agreed by all that a vacancy in the office came about upon the death of Judge Emerson on February 24, 1950. 46 C.J. states the text on the meaning of vacancy, page 971, in Section 117, which reads, in part, as follows:

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"While the word 'vacancy' as applied to an office is one which has no technical meaning, an office is vacant in the eye of the law whenever it is unoccupied by a legally qualified incumbent who has a lawful right to continue therein until the happening of some future event. On the other hand, an office is not vacant so long as it is supplied, in the manner provided by the constitution or law, with an incumbent who is legally qualified to exercise the powers and perform the duties which appertain to it. * * * ."

Our Supreme Court in the case of State ex rel. vs. Ralls County Court, 45 Mo. 58, considered a case where a vacancy occurred in the office of sheriff of Ralls County upon the ouster of an individual who had been improperly certified as elected by the county clerk, and in so doing the county clerk had refused to count the votes of one of the precincts of the county. The county court of Ralls County appointed the same person as sheriff who had been ousted by the decree of the Supreme Court and called a special election to elect a new sheriff. The question of whether there was a vacancy in the term of the sheriff arose after the county court appointed a sheriff and ordered the special election and became one of the principal points in the case. The Supreme Court in giving its definition of what constitutes a vacancy, 1.c. 60, said:

"* * * Whether there was a vacancy or not did not depend upon the question of intrusion, but upon the further question not directly passed upon by the court, whether there was any one else entitled to hold the office. * * *"

"* * * If we are to understand by vacancy an interregnum, without reference to the right of any one to fill the place or the space, before the person entitled to it has qualified, then the action of the court created one; but such a vacancy as the County Court is authorized to fill implies a state of things where no one has any title to the office * * * ."

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46 C.J. 1006, defines title to a public office as follows:

"Title to a public office means the right which claimant has to it, * * *. A valid title must rest upon a legal appointment or election."

Upon the death of Judge Emerson, February 24, 1950, and until March 3, 1950, there was no incumbent in the office of Probate Judge of Jasper County who could claim title to the office. The operation of the office and the performance of the functions incident thereto were suspended and the office became dormant and vacant instantly upon the death of Judge Emerson. Not again until March 3, 1950 was there an incumbent in the office who was vested with and could claim title to the office, and incidentally, the compensation provided by law to be paid to the incumbent. If, as the authorities state, the right to compensation by an incumbent of public office to compensation depends upon a valid title to the office, then it must follow that Judge Emerson had no title to the office because of his death and left nothing to his estate by reason of his incumbency prior to February 24, 1950. It is likewise apparent and conclusive that Judge Johnson had no title to the office nor the right to claim title or compensation incident to the office as an incumbent thereto until his appointment by the Governor March 3, 1950. It is the occupant or incumbent of the office to whom compensation or salary is to be paid and not the office itself. Note the language of Section 3, supra. That section fixes the salary of the Probate Judge. That means the incumbent in the office.

Manifestly, Judge Johnson's appointment was not retrospective, with respect to title or compensation belonging to the office, but was prospective only for the future and unexpired portion of the term to which Judge Emerson was elected at the last previous General Election.

Your letter recites a number of authorities cited by Judge Johnson as in support of his belief that either the estate of Judge Emerson or he himself is entitled to such sum as compensation during such period.

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We have carefully read these authorities and we believe they do state the law of the case in both text and decisions to conclusively hold that neither the estate of Judge Emerson, deceased, nor Judge Johnson, as the appointee to fill the vacancy, is entitled to any sum unpaid out of the annual fixed salary of the Probate Judge of that class of counties during such period of vacancy in the office. The first authority cited by Judge Johnson, as your letter states, is 46 C.J., page 1014, Section 233. That section, in part, is as follows:

"The person rightfully holding an office is entitled to the compensation attached thereto; * * * ."

We believe such quoted text would be sufficient authority alone upon which to base a proper and legal conclusion in this opinion that neither the estate of the deceased Judge, nor the living appointed Judge who succeeded him, are entitled to compensation for the period of the vacancy after the death of Judge Emerson to the date of the appointment of Judge Johnson, since no person held the office during such period. We will, however, quote from each of the decisions by our Appellate Courts noted in your letter and cited by Judge Johnson because they do show what our highest Courts have held, and are the basis of this opinion. While it is true that the salary of a public officer, such as the Probate Judge in this case, is an incident to the legal title to such office regardless of services rendered or the time in which he is actually engaged in performing the duties of the office, and all, or nearly all, of the cases cited by Judge Johnson so state, but there is not one of such authorities, text or decision, as we read them, that is not based positively upon the premise and assumption that there must be, and was in each of these cases an incumbent in the office who there claimed title or had legal title to the office. This was held to be a necessary condition by our Supreme Court in the case of State ex rel. vs. Walbridge, et al., 153 Mo. Rep. 194. That was a case where the Board of Police Commissioners of the City of St. Louis had improperly dropped a policeman from the police force of that city and was an appeal by said Board of Commissioners from the judgment of the Circuit Court of said city granting a peremptory writ of mandamus

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commanding the Board to rescind its previous order dropping the relator from the police force, to re-instate him and issue to him a warrant upon the city treasurer for compensation due him during the period of his removal from his office. The term of the office of the officer removed had expired during the pendency of the appeal. The Supreme Court said in its decision that it would be unavailing as a right or benefit to the removed officer to direct the Board to re-instate him. But the Court reversed the case, directing the Board of Police Commissioners of said city to issue relator a warrant upon the city treasurer for the full amount of his salary during the period of his being deprived of his office. On the point here being discussed, and saying that the removed officer was entitled to the office during all the time of his removal, and in effect that there must be an incumbent in an office in order to merit and receive compensation, l.c. 203, the Court said:

"* * * To the office of policeman from which he was removed he had good title, he was in possession, and no one was disputing it. To that office the law attached a monthly salary, and to that salary he was entitled so long as the law remained in force and under it he lawfully held the office. The legal right to the office carried with it the right to the salary. The board by its wrongful act could not deprive him of this legal right. The right of a public officer to the salary of his office, is a right created by law, is incident to the office, and not the creature of contract, nor dependent upon the fact or value of services actually rendered. * * *."

In the case of Stratton vs. City of Warrensburg, cited by Judge Johnson, 167 S.W.(2d) 392, the Kansas City Court of Appeals in its decision in that case in effect and substance holding that one must be a legal incumbent of a public office before he may claim the compensation attached to the office, l.c. 396, said:

"* * * The true rule is that the right to the compensation attached to an office is an incident to the legal right to the office and not to the exercise of the

Honorable H. Tiffin Teters

functions of the office. Cunio v.
Franklin County, 315 Mo. 405, 285
S.W. 1007, and cases cited."

The exercise of "the legal right to the office" as said by the Court in the Warrensburg case means that such claim to the legal right to the office must be made by a living person who occupies the office, either by election or by appointment.

In the case of Cunio vs. Franklin County, 315 Mo. Rep. 405, the Supreme Court was considering a case of a claim for salary by Cunio, a probation officer, involving the legality of his appointment. The Supreme Court held that Cunio was not lawfully appointed and consequently was not entitled to maintain his suit against Franklin County for compensation. Basing its decision upon the question of the validity of Cunio's appointment and holding that he must necessarily have been lawfully appointed to the office in order to be entitled to compensation incident thereto, and that there must be an incumbent in an office entitled to the office before compensation can be paid to a claimant thereto, l.c. 407, the Court said:

"* * * The decision turns on the fact of plaintiff's appointment to said office. If he was appointed thereto, he is entitled to the emoluments thereof.

"It is a well-established principle that a salary pertaining to an office is an incident of the office itself, and not to its occupation and exercise, or to the individual discharging the duties of the office.

"On the other hand, it is equally well settled that, if a person exercising the functions of an office is not entitled to the office, he cannot maintain an action for his services.

"In Luth v. Kansas City, 203 Mo. App. l.c. 113, the court said: 'In this State it is held that a salary is attached to and

Honorable H. Tiffin Teters

depends upon the legal title to the office and that the de jure claimant is entitled to the salary even though he has not occupied the office or performed the duties thereof. (State ex rel. v. Walbridge, 153 Mo. 194, 203; State ex rel. v. Gordon, 245 Mo. 12, 28, 29.) And following the logical result of the rule stated in those cases it was held in Sheridan v. St. Louis, 183 Mo. 25, 38, 40, that a de facto officer who has performed the functions of the office cannot recover the salary attached to such office."

The case of Luth vs. Kansas City, 203 Mo. App. Rep. 110, was a suit for salary as chief clerk in the water department of the defendant city by Luth. The city, being aware of a contest between Luth and one Folk for the office, withheld salary from both claimants for a time, but, without waiting for the settlement of the question of title to the office between the two contestants, paid Folk the salary incident to the office as an officer de facto. Luth prevailed in the Circuit Court of Jackson County in his suit against the city, after establishing that he was the de jure officer and entitled to the place. The Kansas City Court of Appeals in affirming the judgment rendered for Luth by the Circuit Court, holding that the salary attached to a public office depends upon who is in possession of the legal title to the office, that is, the lawful incumbent, l.c. 113, said:

"In this State it is held that a salary is attached to and depends upon the legal title to the office and that the de jure claimant is entitled to the salary even though he has not occupied the office or performed the duties thereof. * * * ."

The case of Tom M. King vs. Riverland Levee District was decided by the St. Louis Court of Appeals, 218 Mo. App. 490. The decision recites that Tom M. King was collector of revenue of Pike County, Missouri, at the time the question arose because of which the suit was filed. The agreed statement of facts upon which the case was tried before the Circuit

Honorable H. Tiffin Teters

Court contained the stipulation that "Plaintiff was on the 1st day of March, 1919, duly elected and qualified as the collector of Pike County, Missouri, * * * ." The action was for a claimed commission upon taxes of the levee district derived from a suit brought and sales had of the property on execution for delinquent levee taxes where money was paid by reason of such executions and sales and paid directly to the treasurer of the levee district by the sheriff. The Court held that the collector, King, was not entitled to commission on such funds on the ground that no statute specifically allowed the collector a commission on such funds, but that such funds, under the appropriate statute then in force, required the payment thereof by the sheriff directly to the treasurer of the levee district. In so deciding the case the Court held that there must be a statute authorizing the payment of compensation to a public officer for the performance of his duties and upon the point, l.c. 493, said:

"It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. * * * ."

Our Supreme Court held that a public officer's right to compensation as an incident to office rests upon whether he is entitled to the office or not, in the case of State ex rel. Evans vs. Gordon, 245 Mo. 12. The suit was in mandamus by Evans, relator, Superintendent of Public Schools to compel Gordon the then State Auditor to issue to relator a warrant for salary which he claimed was due. Howard A. Gass contested the right to the office with Evans. Gordon, State Auditor, refused to issue his warrant to Evans because of a statute in force prohibiting the issuing of a warrant to a person involved in a contest for office. Gordon filed a demurrer to relator's petition, setting up the bar of the statute to the issuing of a warrant under the facts alleged in the petition. The Supreme Court sustained the respondent's demurrer, the effect of which was to hold that the relator, Evans, was not entitled to the warrant in payment of claimed salary at the hands of the State Auditor because it was not established that he had title to the office. In so doing the Court defined the right of a public officer to compensation where, l.c. 27, 28, the Court said:

"Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the amount or value of services performed, but is incidental to the office.

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"Throop on Public Officers (Sec. 443) says: 'It has been often held, that an officer's right to his compensation does not grow out of a contract between him and the State. The compensation belongs to the officer, as an incident of his office, and he is entitled to it, not by force of any contract, but because the law attaches it to the office.'

* * * * *

"Not only is the right to compensation dependent upon statute, but the method or particular mode provided by statute must be accepted. On this point the Kansas City Court of Appeals says: 'It seems the general rule in this country, as announced by the decisions and text-writers, that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute. And further, it seems well settled that if the statute provides compensation in a particular mode or manner, then the officer is confined to that manner, and is entitled to no other or further compensation, or to any different mode of securing the same. * * * Such statutes, too, must be strictly construed as against the officer. * * * ."

The effect of these decisions, is inevitably, we believe, to deprive both the estate of Judge Emerson and Judge Johnson from claiming any part of the unpaid annual salary of the Probate Judge of Jasper County, Missouri, because there was no incumbent in the office and no person had title thereto from February 24, 1950 to March 3, 1950.

The case of Nodaway County vs. Kidder, 129 S.W. (2d) 857, was before the Supreme Court of this State on appeal upon an action by Nodaway County against A. P. Kidder, Presiding Judge of the County Court of that county to recover an excess of salary and mileage paid to the Presiding

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Judge over and above the sum he was entitled to under existing statutes. The County prevailed in the Circuit Court. The Presiding Judge appealed to the Supreme Court. The Court affirmed the judgment in favor of the County and against Kidder, holding that the County had established that the defendant, Kidder, received public funds which were in excess of his salary, and that he had failed to meet the burden of showing his right to retain the excess funds over his compensation as established by law. The Court in so holding, gave expression to what has become a classic rule in the construction of the right of a public official to compensation for services, where, l.c. 860, the Court said:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment.
* * *."

No claim to the title of the office of Probate Judge being possible by Judge Emerson or Judge Johnson between February 24, 1950, and March 3, 1950, it seems clear under the above authorities that neither said estate nor Judge Johnson is entitled to any compensation from Jasper County during such period.

Your letter asks the further question whether, if neither the estate of Judge Emerson, nor Judge Johnson, is entitled to any percentage of such salary during such vacancy, should such part thereof be transferred to the school fund of said county.

As pointed out above, Jasper County is a county of the second class. It is subject to the statutes relating to budgets in second class counties, Laws of Missouri, 1945, page 603. Section 10923 of said Act, page 604, provides, in part, that all receipts of the county for operation and maintenance shall be credited to the general fund, and all expenditures for such purposes shall be charged to such fund. Also, as previously pointed out herein, Section 5, page 1515, Laws of Missouri, 1945, as quoted, provides that salaries of Probate Judges shall be paid monthly by the county, upon requisition issued by the Judge of such court.

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The only reference we find requiring payment into the county school fund of such counties, funds relating to the Probate Judge's office is in Section 6, page 1516, Laws of Missouri, 1945, which reads as follows:

"In all counties now or hereafter having more than 30,000 inhabitants, whenever the probate fees collected in any such county during any calendar year, irrespective of the date of accrual of such fees, exceed the sum actually expended during such calendar year for the hire of clerks, assistants and stenographers and the salary of the probate judge, a sum equal to such excess fees shall be transferred to the school fund of such county by the county treasurer within five days after the final report of fees and salaries paid is made by the probate judge."

In compliance with said section 6, supra, if the fees collected in said county during the calendar year exceeded the sum actually expended during such calendar year for the maintenance of the office of Probate Judge in said county, then such computed part of the Probate Judge's salary as was unpaid between February 24, 1950, and March 3, 1950, which is a part of such excess, because of the vacancy in such office, should be transferred to the school fund of such county under said Section 6.

CONCLUSION

It is, therefore, the opinion of this department by reason of the authorities herein cited and quoted:

1) That neither the estate of Judge Emerson, nor Judge Johnson, in person, is entitled to any part of the annual salary of the Probate Judge of Jasper County, Missouri, during the period of vacancy in said office, from February 24, 1950, to March 3, 1950, inclusive;

2) That the remaining balance of such salary unused and unpaid during such vacancy, if the fees collected in said county during the calendar year exceeded the sum actually expended during such calendar year for the maintenance of the

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office of Probate Judge in said county which is a part
of such balance should be transferred to the school
fund of such county under said Section 6.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

JET

J. E. TAYLOR
Attorney General

GWC:ir

VOCATIONAL
REHABILITATION:
INSURANCE:

A person receiving vocational rehabilitation training, having in his custody property owned by the state of Missouri has an insurable interest in such property. The proceeds of such policy may be made payable either to the State Treasurer for the State of Missouri or to the State Board of Education. Disbursement of the proceeds payable by the insurer depends upon who is named beneficiary.

February 5, 1951

2/9/51



Mr. Joy O. Talley, Director
Vocational Rehabilitation
Division of Public Schools
Room 1, Hotel Governor
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your recent letter requesting an opinion from this office. Your request reads as follows:

"A client of the Section of Vocational Rehabilitation, Department of Education, for whom we recently purchased \$800.00 worth of shoe repair placement equipment, would like to purchase some fire insurance to cover this equipment. The client understands that the title to this equipment remains with the state and that he cannot now nor at any future time claim this equipment as his own. He, however, would like to carry some insurance on the equipment in order to protect the state and, indirectly, to protect himself. He is ready, willing, and anxious to purchase the fire insurance and to pay for it himself, but does not know how the policy should be made out.

"We would like an opinion from your office as to whether or not such insurance could be bought, and whether or not the beneficiary should be the State of Missouri or the Section of Vocational Rehabilitation. Also, if settlement were made by the insurance company in case of damage could the money be used by the Section of Vocational Rehabilitation or would it revert to the general revenue of the state?"

Mr. Joy O. Talley, Director.

The rehabilitation client is in the position of a bailee of the property placed in his possession by your department for his use. He has an insurable interest in the property and may enter into a contract of insurance against loss of the property which he has in his possession.

In the case of American Surety Co., of New York v. Normandy State Bank (108 F.2d. 819), the court in discussing the right of a bailee to purchase insurance under Missouri law, said:

"One seeking to recover on a policy of burglary and theft insurance must, of course, allege and prove that he has an insurable interest in the property described in the policy.
* * * It has been held that one having the care, custody or possession of property for another, though without liability and without any pecuniary interest, may nevertheless obtain insurance upon such property for the benefit of the owner. (citations)."

In this recent decision the court held that any bailee or person in custody of property and responsible for it may purchase insurance against loss. Following this decision it is the opinion of this office that the rehabilitation client has an insurable interest in the property placed in his custody for use as described in your letter.

Inasmuch as the individual receiving vocational rehabilitation is not required by law to enter into a contract of insurance on property used by him and to pay premiums on such a contract it is within his option to make the proceeds of the policy, in the event of loss, payable either (1) to the State Treasurer for the State of Missouri or (2) to the State Board of Education. A discussion of the disposition of the proceeds of the insurance policy under each option will be made.

(1) In the event the rehabilitation client makes the proceeds of the policy payable to the State Treasurer for the State of Missouri, as he may elect to do because the State is the legal owner of the property, such proceeds would be payable into the treasury and the fund could not be disbursed except pursuant to appropriation made by the General Assembly.

Your attention is directed to Article III, Section 36 of the state constitution which reads in part as follows:

"All revenue collected and money received by

Mr. Joy O. Talley

the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law. * * *

And to Article IV, Section 15 which reads in part as follows:

"The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. * * *

Under these provisions of the state constitution requiring money received by the state to be paid into the State Treasury if the user of the property elects to make the proceed of the policy payable to the State of Missouri then such proceeds, should loss be incurred, would be paid into the State Treasury. Further, the state treasurer under these provisions of the constitution is not authorized to divert money or permit withdrawals from the treasury except in pursuance of appropriations made by the General Assembly.

(2) The user of the property may elect to make the proceeds of an insurance policy payable to the State Board of Education under the provisions of RSMo. 1949, Section 162.320, which reads as follows:

"The state board of education is hereby authorized and empowered to receive such gifts and donations, either from public or private sources, as may be offered unconditionally or under such conditions related to the vocational rehabilitation of persons disabled in industry or otherwise and consistent with the provisions of sections 162.280 to 162.320. All moneys received as

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gifts or donations shall be deposited in the state treasury and shall constitute a permanent fund to be called the special fund for the vocational rehabilitation of disabled persons, to be used by the said board to defray the expenses of vocational rehabilitation in special cases including the payment of necessary expenses of persons undergoing training. A full report of all gifts and donations, offered and accepted, together with the names of the donors and the respective amounts contributed by each, and all disbursements therefrom shall be submitted biennially to the general assembly."

Since the individual receiving vocational rehabilitation assistance is under no legal obligation to enter into a contract of insurance on property used by him and pay premiums on such a contract such payments are in the nature of a gift or donation to the state and the proceeds of the policy, in the event of loss, could be made payable to the state board of education and disposed of as directed by Section 162.320, quoted above. The fact that the State Board of Education will actually receive nothing except upon the happening of a contingency, i.e. the destruction or damage, to the property makes it none the less a gift. Reimbursement for loss would not be made directly to the section of Vocational Rehabilitation but to the State Board of Education who is authorized to receive gifts or donations and deposit them as directed by Section 162.320, in the state treasury which is charged with the responsibility of acting as custodian of such funds. This fund would not constitute a gift from the insuring company from whom the State Board of Education would have a legal right to recover in the event of loss but a gift from the rehabilitation client which would only become payable upon the happening of a contingency, i.e. loss or damage to the property.

In the case of State ex rel. L.D. Thompson v. Board of Regents of Northeast Missouri Teacher's College, 305 Mo. 57, the court was discussing the disposition of proceeds of a fire insurance contract received by the college as a result of loss by fire. The premiums for the policy were paid with money which was not appropriated by the State Legislature. In that case the court ruled the proceeds of the policy should be paid to the Board of Regents of the college in the absence of a statute otherwise directing their disposal. A statute does control the disposition of the fund involved in your inquiry.

The question presented by you is resolved by the statute which

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requires that all money received as gifts or donations for this fund shall be deposited in the state treasury and shall constitute a special fund for the vocational rehabilitation of disabled persons, to be used by the board of education to defray the expenses of vocational rehabilitation in special cases including the payment of necessary expenses of persons undergoing training.

The Legislature has appropriated money coming into the state treasury to the state board of education in the following words (L 1949, p. 20, Sec. 2.033):

"All allotments, grants and contributions of funds from the federal government or other sources which may be received for the period beginning July 1, 1949 and ending June 30, 1951, for the purpose of providing for vocational rehabilitation * * * shall stand and are hereby appropriated to the State Board of Education. * * *" (Underscoring ours)

While Section 162.320 requires a full report of all gifts and donations and all disbursements therefrom be submitted to the General Assembly biennially, a fund created by such gifts or donations would require no further appropriation than that already made by Section 2.033, L 1949, p.20, quoted above, as a prerequisite to making disbursements therefrom.

CONCLUSION

A person under the direction of the Section of Vocational Rehabilitation having in his custody for use property owned by the State of Missouri has an insurable interest in such property and may purchase insurance thereon.

The proceeds of such policy may be made payable to the State Treasurer for the State of Missouri in the event of loss, because the state is the legal owner of the property. If the proceeds are made payable to the State of Missouri the Section of Vocational Rehabilitation could not use the funds paid by the insurer to the State until such fund was re-appropriated by the State General Assembly.

The rehabilitation client may, at his option, make the proceeds of the policy payable to the State Board of Education of the State of Missouri, and in the event of loss, the proceeds of the policy must be paid to the State Board of Education and deposited in the state treasury in the permanent fund called the special fund for vocational rehabilitation of disabled persons,

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to be used by said Board to defray the expenses of vocational rehabilitation in special cases including the payment of necessary expenses of persons undergoing training. While the Board is required to submit a full report of the contributions to the fund and disbursements therefrom biennially to the General Assembly the board may order disbursements from the fund pursuant to appropriation made by the General Assembly in Laws 1949, p. 20, Sec. 2.033.

The proceeds of the policy should not be made payable to the Section of Vocational Rehabilitation.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:

OK

J. E. TAYLOR
Attorney General

JEM:mw

LEGISLATURE :
CONSTITUTION:

House Bill No. 72, as perfected by the 66th
General Assembly, is constitutional.

April 20, 1951

Honorable Cecil T. Taylor
Representative, Shelby County
66th General Assembly
Jefferson City, Missouri



Dear Mr. Taylor:

This will acknowledge receipt of your request for an
official opinion which reads:

"You remember my conversation with you
yesterday concerning my wanting an opin-
ion of your office as to the constitu-
tionality of House Bill No. 72, which is
now in Senate committee.

"I am enclosing a copy of this bill and
refer you to Page 2, Section 2, and word-
ing as outlined. I would appreciate your
opinion in this respect at your very earli-
est convenience. The wording in Section 2,
I maintain, is in conformity with the con-
stitution, Article 10, Section 4 (a) which
gives us the right to classify properties
within classes two and three, based solely
on the nature and character of the property.
You will notice that this property is to be
taxed 10 percentum of its value."

The law you are attempting to amend, namely Section
137.115, RSMo 1949, now requires the assessor or deputy to
make a list of all real and tangible property in the county,
town or district and assess same at the true value in money,
and also the assessor shall require persons to make a correct
list of such property. The only exception contained therein
is that on merchandise where the owner may be required to pay
a license tax and also except all other property which may be
exempted by law from taxation. Said section reads:

"1. After receiving the necessary forms
the assessor or his deputy or deputies
shall, except in the city of St. Louis,
between the first day of January and the

Honorable Cecil T. Taylor

first day of June, 1946, and each year thereafter, proceed to make a list of all real and tangible personal property in his county, town or district, and assess the same at its true value in money in the manner following, to wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable real and tangible personal property in the county owned by such person, except merchandise which may be required to pay a license tax and except all other property which may be exempted by law from taxation.

"2. The person listing the property shall enter a true or correct statement of such property, in a printed blank prepared for that purpose, which statement after being filled out shall be signed and either affirmed or sworn to as provided in section 137.155. The list shall then be delivered to the assessor."

The proposed House Bill No. 72 merely contains another exception which is that of agricultural field crops in an unmanufactured condition which are used or intended to be used solely as seed or in the feeding of livestock or poultry, and further declaring that same shall constitute a separate class of tangible personal property to be assessed for the purpose of taxation at 10 per cent of their true value in money.

One of the primary rules of the construction of statutes is to ascertain the lawmakers' intent from the words used, if possible. See *Union Electric Company v. Morris*, 222 S.W. (2d) 767, 359 Mo. 564. Also *State ex rel. Lentien v. State Board of Health*, 65 S.W. (2d) 943, 334 Mo. 220.

In determining whether the foregoing exception contained in the proposed House Bill No. 72 constitutes a proper classification under the Constitution and laws of this state, it is necessary to examine Section 4(a) and Section 4(b), Article X, Constitution of Missouri, 1945. Section 4(a), *supra*, provides that all taxable property shall be classified as follows: (1) real; (2) tangible personal; (3) intangible personal.

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It further provides that the General Assembly may provide classification within Classes 2 and 3, based solely on nature and characteristics of the property and not nature, residence or business of the owner, or the amount owned. Section 4(b), supra, provides that property in Classes 1 and 2 and sub-class 2 shall be assessed for taxation purposes at its true value or percentage of value as may be fixed by law for each class and for each sub-class of Class 2. The foregoing provisions read:

"Sec. 4(a).* Classification of Taxable Property--Taxes on Franchises, Incomes, Excises and Licenses.--All taxable property shall be classified for tax purposes as follows: Class 1, real property; Class 2, tangible personal property; Class 3, intangible personal property. The general assembly, by general law, may provide for further classification within Classes 2 and 3, based solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned. Nothing in this section shall prevent the taxing of franchises, privileges or incomes, or the levying of excise or motor vehicle license taxes, or any other taxes of the same or different types.

"Sec. 4(b).* Basis of Assessment of Tangible Property--Taxation of Intangibles--Limitation.--Property in Classes 1 and 2 and subclasses of Class 2, shall be assessed for tax purposes at its value or such percentage of its value as may be fixed by law for each class and for each subclass of Class 2. Property in Class 3 and its subclasses shall be taxed only to the extent authorized and at the rate fixed by law for each class and subclass, and the tax shall be based on the annual yield and shall not exceed eight per cent thereof."

There can be no question about this commodity which has been made an exception under Section 137.115, supra, as amended, being tangible personal property, which falls within Classification 2 of the foregoing constitutional provisions. The Constitution provides that the General Assembly may provide

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classification within Class 2, based solely on nature and characteristics of the property. "Nature" has been defined as those qualities which inhere in and pertain to it, or the sum of qualities and attributes which make a thing what it is distinguished from others. In *Schultz v. Howard*, 65 N.W. 363, 63 Minn. 196, 56 Ann. St. Rep. 640, the court, in defining "nature," said:

" * * * Assuming that the Globe National Bank, at which the notes were payable, is in Illinois, this statute, if pleaded, would have been decisive of the case, for it is settled law that the place of the contract regulates its validity, interpretation, and the nature of its obligation. By 'nature' is meant those qualities which inhere in and pertain to it; as whether it is joint, or joint and several. * * * "

Webster's New International Dictionary, Second Edition, further defines "nature" as follows:

"1. The essential character or constitution of a particular thing, a species, or a kind; distinguishing quality or qualities; essence; as, the nature of steel, of matter, of love, or a literary movement. * * * "

"Characteristic" has been defined by Webster's New International Dictionary as a trait, quality or property distinguishing an individual, group or type. It cannot be denied that this proposed classification under House Bill No. 72, as perfected, in no manner is based solely on residence, business of the owner, or the amount involved; but, it appears that it is based solely upon the nature and characteristics of the property under the foregoing definitions of those words as used in the foregoing constitutional provisions.

Neither can it be said that this is a special or local law, and by reason thereof, it violates the Constitution of this state. It has been held that an act which embraces all persons who are or who may come into like situations and circumstances is not a special act. See *City of Springfield v. Smith*, 19 S.W. (2d) 1, 322 Mo. 1129; *State ex rel. Martin v. Wafford*, 121 Mo. 61. Also, it has been held that a law which affects equally all persons who come within its operation is not a local or special law. See *State ex rel. Moseley, et al. v. Lee, et al.*, 5 S.W. (2d) 83, and *Waterman v. Chicago, Bridge & Iron Works*, 41 S.W. (2d) 575. However, it is no longer

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material whether it is special or local law since there is now no inhibition against the General Assembly passing a local or special law exempting property from taxation. Section 53, Article IV, Constitution of Missouri, 1875, sub-section 23, contained a specific prohibition against the Legislature passing any special or local law exempting property from taxation. No similar provision is contained in the Constitution of Missouri, 1945.

In the instant case, under the foregoing constitutional provisions, namely Section 4(a) and Section 4(b), Article X, Constitution of 1945, which specifically grants the General Assembly authority to provide for classification within Classes 2 and 3, based solely upon the nature and characteristics of the property, and further providing that property in Class 2 and sub-class 2, which sub-class includes the commodity made herein an exception under House Bill No. 72, supra, shall be assessed for taxation purposes at a percentage of its value as may be fixed by law, we must conclude that House Bill No. 72, as perfected, is constitutional.


CONCLUSION

It is the opinion of this department that House Bill No. 72, as perfected by the 66th General Assembly of the State of Missouri, does not conflict with the provisions of Section 4(a) and Section 4(b), Article X, Constitution of Missouri, 1945, and, therefore, said bill is constitutional.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

ARR:VLM

SHERIFFS SALARIES,) Salary of sheriffs in 3rd class counties
3RD CLASS COUNTIES:) is determined by 1950 decennial census.

SHERIFFS EXPENSE IN) County Court should allow sheriffs of 3rd
SERVING CRIMINAL) class counties expense for gasoline actually
PROCESS:) used in serving criminal process.

September 27, 1951

10-2-51

Honorable O. C. Tee
Prosecuting Attorney
Caldwell County
Kingston, Missouri



Dear Sir:

We are in receipt of your letter of recent date requesting an opinion of this department, which request is as follows:

Question No. 1 - "I request that you please advise as to the legality of the law by which the salary of the Sheriff of Caldwell County, whose term commenced on January 1, 1949, and ends on December 31, 1952, is purportedly reduced during such term of office from \$1600.00 per year to \$1200.00 per year. In other words, may such an officer's salary be legally reduced during the term for which he was elected?"

Question No. 2 - "Also, I request that you kindly advise if the County Court of Caldwell County is empowered to reimburse the Sheriff of that county for the cost of the gasoline used, in his private automobile, in the performance of his duties as sheriff, or for any part of the cost of gasoline so used by him?"

It will be noted that Caldwell County is a third class county. The population of your county for the purpose of ascertaining the salary of the sheriff is determined on the basis of the 1950 decennial census of the United States. The effective date of the 1950 decennial census was January 1, 1951. (Section 1.100, RSMo 1949.)

Honorable O. C. Tee

The statute fixing the salary of sheriffs of third class counties was enacted in 1945 (Laws of 1945, page 1562, Section 1). This section now appears in RSMo 1949, Section 57.390, and is in part as follows:

"The sheriff in counties of the third class shall receive annually for his official services in connection with the investigation, arrest, prosecution, custody, care, feeding, commitment and transportation of persons accused of or convicted of a criminal offense, the following sums: In counties having a population of less than seven thousand five hundred, the sum of one thousand dollars; in counties having a population of seven thousand five hundred and less than ten thousand, the sum of one thousand two hundred dollars; in counties having a population of ten thousand and less than eleven thousand five hundred, the sum of one thousand four hundred dollars; in counties having a population of eleven thousand five hundred and less than fifteen thousand, the sum of one thousand six hundred dollars; * * * (L. 1945 p. 1562 § 1)"

We understand from your question number one that the population of your county under the 1940 census fell within the bracket, as provided for in said Section 57.390, between eleven thousand five hundred and less than fifteen thousand, and by virtue of said section your sheriff's salary was fixed at one thousand six hundred dollars. Under the 1950 census we understand the population of Caldwell County fell within the bracket between seven thousand five hundred and less than ten thousand. By the provisions of said Section 57.390 your sheriff's annual salary would be decreased from one thousand six hundred dollars to one thousand two hundred dollars.

The decrease should have taken effect on January 1, 1951, as this is the effective date of the 1950 decennial census of the United States.

Honorable O. C. Tee

To further substantiate our position on this question we enclose copies of two recent opinions of this office. One opinion was given to Honorable Walter A. Eggers, Judge of the Probate Court of Perry County, Missouri, dated March 31, 1950, and the other to Honorable William Lee Dodd, Prosecuting Attorney, Ripley County, Missouri, dated January 10, 1951. This last opinion dealt with sheriffs of the fourth class, the other with county clerks in fourth class counties.

We believe these opinions contain the information requested by you and hold that the salary of the sheriff of your county (a third class county) is subject to being altered by a change in the population of your county as is provided for in Section 57.390, RSMo 1949.

In answer to your second question we find no statute which specifically provides that a sheriff may be reimbursed for the cost of gasoline used in the performance of his official duties as sheriff. We, however, refer you to Section 57.430, RSMo 1949, which is as follows:

"In addition to the salary provided in sections 57.390 and 57.400, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed five cents per mile."

(Underscoring ours.)

In view of the fact that this statute provides the sheriff may be allowed in addition to his salary his "actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed five cents per mile" we are of the opinion that the item of gasoline so used is a part of his "actual and necessary expenses" and the county court would be authorized to make allowance to the sheriff for the actual cost of gasoline so used.

We call your attention to the fact that the 66th General Assembly has amended said Section 57.390 by 1951 House Bill

Honorable O. C. Tee

No. 100, which amendment is to become effective October 9, 1951. We are enclosing herewith a copy of the truly agreed to and finally passed House Bill No. 100 of the 66th General Assembly for your use in connection with this question.

CONCLUSION


It is, therefore, the opinion of this department that the salary of a sheriff in a third class county is subject to change due to a change of the population, and that such change in salary became effective January 1, 1951.

It is the further opinion of this department that your county court should allow your sheriff his actual expenditure for gasoline for each mile traveled in serving warrants and other criminal process provided his total allowance, at this time, should not exceed five cents per mile.

Respectfully submitted,

GROVER C. HUSTON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

GCH/fh

NEW PATENT ISSUED FOR
PURPOSE OF CORRECTING
ERRONEOUS DESCRIPTION
IN ORIGINAL PATENT:

Secretary of State may issue corrected patent
for land in cases in which land was erroneously
described in original patent from state after
proper showing is made.

January 3, 1951



1-8-51

Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Dear Mr. Toberman:

We have your letter of November 21, 1950, in which you request
an opinion of this department. Your letter is as follows:

"We have had a request in this office for
a land patent which appears incomplete on
the original patent.

"Attached find photostatic copy of the original
patent issued to William McFarland of the County
of Greene, covering a part of the Internal Improve-
ment Land, or the 500,000 Acre Grant. You will
note an erasure or eradication has been made which
changes the original description of the land.

"The Register of Land Sales by the General Land
Office, in 1850, shows that the SW $\frac{1}{2}$ of the SE $\frac{1}{4}$
was sold to William McFarland; the Index covering
all the Internal Improvement Lands also shows it
to be the SW $\frac{1}{2}$ of the SE $\frac{1}{4}$.

"The present owner of this land wants a corrected
patent issued in lieu of the one on file in this
office.

"Please give us your opinion as to whether or not
this original patent may be corrected and, if so,
in what manner."

We have also examined the photostatic copy of the original
patent issued in the year of 1850, by the State of Missouri to
William McFarland.

It is apparent from the records of the Register of Land
Sales by the General Land Office referred to in your aforesaid

Mr. Walter H. Toberman

letter that the land that was sold by the state to William McFarland was actually the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13, Twsp 28, R 21, whereas the land described in the patent to McFarland was the SW $\frac{1}{4}$ of Section 13, Twsp 28, R 21, said land being recited in said patent as containing forty acres. This is obviously an error for the reason that the SW $\frac{1}{4}$ of said Section 13 would contain one hundred and sixty acres instead of forty acres, whereas the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 13 would contain forty acres, the amount recited in the patent as the acreage intended to be conveyed. We are, therefore, of the opinion that it was the intention of the person who issued the patent to convey by said patent the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 13 instead of the SW $\frac{1}{4}$ of said Section 13, the land actually described in the patent and that an error in the description of the land in the patent heretofore issued in 1850 was therefore made. This conclusion is supported by the fact that the records of the land office as above stated indicate that the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 13 was sold to McFarland and that he was accordingly entitled to a patent to said land whereas there is nothing before us to indicate that McFarland ever purchased the SW $\frac{1}{4}$ of said Section 13 or was ever entitled to the issuance of a patent conveying to him the last above described land.

Since the land in the patent issued to McFarland was erroneously described as the SW $\frac{1}{4}$ of said Section 13 instead of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 13, which last described land, according to your above-quoted letter, is owned by the man who desires a corrected patent, we must consider Section 12715, R. S. A. Mo. 1939, which we quote as follows:

"In cases where errors shall have been made in the description of lands in any patent heretofore made, the person to whom such patent has been issued or any person who has acquired the title to the land intended to be described in said erroneous patent by mesne conveyances from the persons to whom such erroneous patent has been issued, may have a new patent issued, correctly describing such land upon first making proof that he or some one under whom he claims purchased from the state the land to which he desires a corrected patent, and that the state has been paid for the same by affidavits or otherwise to the satisfaction of the secretary of state, and, second, filing his affidavit that he sets up no claims to the land described in the patent sought to be corrected, and that neither he, nor any one

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by, through or under whom he claims has ever set up any claim to such land under or by virtue of said patent; and upon producing said affidavit to the secretary of state, the correction asked shall be made, and a new patent shall be issued correctly describing the said land, upon the delivering up of the erroneous patent, or upon the applicant showing to the secretary of state by the affidavits of two disinterested householders of the township in which said land is located, that the applicant and those under whom he claims title have been in the open notorious, exclusive, continuous, adverse and hostile possession of all of said lands for the period of ten years last past prior to the time of filing said application, and that during said period of time no person has ever set up or made any claim to said land or any part thereof, hostile or adverse to the title of the applicant and those under whom he claims, and shall execute a deed releasing the erroneously patented land to the state: Provided, however, that the records in the office of the secretary of state shall show that the land is state land, and has not been disposed of to any other person: Provided further, that all such proofs aforesaid shall be filed in the land department of the secretary of state and preserved among the records thereof."

We are of the opinion that the above-quoted statute is applicable to the facts before us and that under the provisions of said statute the person who has by mesne conveyances from McFarland acquired the equitable title to the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 13, heretofore vested in McFarland by reason of his above-mentioned purchase of said land from the state is entitled in the words of said section to have "a new patent issued correctly describing such land provided he makes the necessary proof and meets the requirements of said statute specifically set forth therein."

In this connection the question occurs as to whether the new patent being corrective in its nature should be made to McFarland, the original purchaser, or to the present owner. We are of the opinion that the patent should be issued to the present owner in view of the following language of the statute, "* * * the person to whom such patent has been issued or any person who has acquired the title to the land intended to be described in said erroneous patent by mesne conveyances from the persons to whom such erroneous

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patent has been issued may have a new patent issued correctly describing such land * * *." We are of the opinion that since the statute says, as appears in the last above quotation, that the person who has acquired the land by mesne conveyances from the original patentee "may have a new patent issued" the inference may be drawn that such person may have the new patent issued to himself.

Having hereinabove answered your inquiry as to whether the original patent may be corrected by saying that a new patent may be issued to the owner, we shall now give attention to that part of your inquiry which asks in what manner this is to be done. In this connection we quote Section 12726, R.S.A. Mo. 1939, as follows:

"The patents issued in virtue of the provisions of this article shall be signed by the governor, countersigned by the secretary of state, and attested by the great seal of the state of Missouri."

We are of the opinion that the burden of following the course set out in Section 12715, supra, as prerequisite to having a patent issued rests upon the person seeking the patent. We are of the further opinion that if and when that person has complied with each requirement of said section set forth as a prerequisite to the issuance the Secretary of State, after checking the records in his office and assuring himself that the land for which the patent is desired is state land and that it has not been disposed of to any other person, should cause a patent to be prepared following the form usually used by the State of Missouri and present same to the Governor for his signature, and if and when the Governor shall sign the patent the Secretary of State should countersign it and affix the great Seal of the State of Missouri thereto in accordance with the provisions of Section 12726, supra, and deliver the patent to the patentee and keep a copy thereof for his records. The Secretary of State should then file all documents in the nature of proof required by the statute among the records of his office.

We shall now refer to the things which the Secretary of State should satisfy himself have been complied with by the persons seeking the new patent as a prerequisite to the issuance thereof.

We are of the opinion that the Secretary of State should take no steps toward the issuance of the desired new patent until he is (1) provided with satisfactory proof adduced by the person seeking the patent that said person or someone under whom he claims (in this case, McFarland) purchased the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said

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Section 13 from the state and that the state has been paid for same which said proof may be made by affidavit or by the land office records or may be made otherwise to the satisfaction of the Secretary of State and (2) provided with satisfactory proof presented by said person in affidavit form that he sets up no claim to the land embodied in the erroneous description in the original patent and that neither he nor any one by, through or under whom he claims, has ever set up any claim to the land under or by virtue of the original patent, (3) presented with the original patent which contains the erroneous description of the land, which patent must be delivered to the Secretary of State, which said delivery, if and when made, completes the proofs to be required of the applicant by the Secretary of State or in the alternative if said patent be not delivered as aforesaid, then provided with affidavits of two disinterested freeholders of the township in which the land for which the new patent is sought is situated to the effect that the applicant and those under whom he claims title have been in open, notorious, exclusive, continuous, adverse and hostile possession of all of said lands for a period of ten years last past prior to the filing of the application for the new patent and that during said period of time no person has ever set up or made any claim to said land or any part thereof, hostile or adverse, to the title of the applicant and those under whom he claims (4) presented with a deed executed by the applicant releasing the erroneously patented land (in this case the SW $\frac{1}{4}$ of said Sec. 13) to the State of Missouri.

We are of the opinion that all of the things last above enumerated except the thing excluded by the choice of one or the other of the alternatives above mentioned must be done to the satisfaction of the Secretary of State before he has any right or duty to take any steps toward the issuance of the new patent applied for but we are of the further opinion that when all such things, with the exception of the excluded alternative have been done to his satisfaction it is his duty to proceed with the work of issuing the desired new patent.

CONCLUSION

We are accordingly of the opinion that the person in whom the equitable title to the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 13 obtained by mesne conveyances from McFarland the man who purchased said land from the state in 1850 is vested, is entitled to a new patent conveying said land to him in accordance with the provisions of Section 12715, supra, in view of the fact that the patent issued to McFarland in 1850 did not describe the land purchased by him but described other land.

Mr. Walter H. Toberman

We are of the further opinion that said patent should follow the form ordinarily used by the State of Missouri in the conveyance of its public lands and should be signed by the Governor and countersigned by the Secretary of State and that it should be attested by the Great Seal of the State of Missouri, as provided by Section 12726, supra.

We are of the further opinion that before issuing and delivering said patent the Secretary of State should assure himself that the proofs required by Section 12715, supra, as above outlined, have been submitted.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SMW:mw

LEGISLATURE) Number of Representatives ^{in Legislature from respective} determined on basis ^{Counties}
) of final census figures. 1

January 8, 1951

1-8-51
FILED

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Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Attention: J. Paul Markway

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Article III, Section 2 of the Missouri Constitution says, '... On the taking of each decennial census of the United States, the Secretary of State shall forthwith certify to the county court ... the number of representatives to be elected in the respective counties.'

"We have written the Bureau of the Census for the official figures. We have, at this date, only received the preliminary counts with a letter stating that we would receive an advance report of the final figures.

"It has been called to our attention that according to a recent opinion written for Marion County, the preliminary figures should be considered official in the absence of the final report.

"We respectfully request your opinion as to whether we should use these preliminary figures or wait for the final report in satisfying the above constitutional duty."

Honorable Walter H. Toberman

Section 1.10 of Senate Bill No. 1001 of the Sixty-fifth General Assembly provides as follows:

"The population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year or for the amount of fees he may retain or the amount he shall be allowed to pay for deputies and assistants shall be determined on the basis of the last previous decennial census of the United States. For the purposes of this section the effective date of the 1950 decennial census of the United States shall be January 1, 1951, and the effective date of each succeeding decennial census of the United States shall be on January 1, of each tenth year after 1951."

The opinion for Marion County, to which you refer in your request, is addressed to Honorable Roger Hibbard, Prosecuting Attorney, and is dated November 30, 1950. In that opinion we concluded that in order to determine whether or not a county is entitled to a separate magistrate under the provisions of Section 18 of Article V, Constitution of Missouri, 1945, providing for the separate office of magistrate in counties of more than 30,000 inhabitants, the preliminary census figures might be relied upon. Determination of the question was required by reason of the fact that the person purportedly elected in the November, 1950, election would have taken office on January 1, 1951, if the office existed. In order to determine the status of the office as of that date it was necessary to ascertain whether or not there were available any census figures which might be relied upon, and we concluded that the preliminary figures were sufficient.

In the situation to which you refer the determination of the number of representatives to be elected from each of the counties of the state will become of importance for the election to be held in November, 1952. There is no necessity

Honorable Walter H. Toberman

for any determination as of January 1, 1951, such as was involved in the Marion County opinion. We do not feel that the Constitution or the legislative enactment, above quoted, should be construed to require the Secretary of State to ascertain the number of representatives prior to the publication of final census figures.


CONCLUSION

Therefore, it is the opinion of this Department that determination of the number of representatives in the General Assembly to be elected in the respective counties, in accordance with Article III, Section 2, Constitution of Missouri, 1945, should be based upon the final decennial census figures.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RRW/feh

CRIMINAL LAW: Provisions of R.S.No. 1879, requiring justices of the peace to certify criminal cases occurring in Galena and Joplin townships, Jasper County, Missouri, be certified to the Joplin division of the Circuit Court, repealed.

February 10, 1951

Honorable Dale Tourtelot
Prosecuting Attorney
Jasper County
Joplin, Missouri

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89

2-19-51

Dear Sir:

This is in answer to your request of recent date which reads as follows:

"I am writing you at this time for your opinion in regard to the following:

"The Session Acts of the 29th General Assembly in 1877, Page 210, Section 46, beginning at the 9th Line from the bottom of the Page, states as follows:

"And it shall be the duty of Justices of Peace and to the Committing Magistrates in the Townships of Galena and Joplin in said County, when committing any person charged with a criminal offence, or taking a recognizance to certify the proceedings in such cases to the First Term next ensuing of the Circuit Court to be held in the City of Joplin."

"Section 3893 of the Revised Statutes of 1939 is to the effect that the cases shall go to the next regular Term of Circuit Court.

"As you know, we hold Circuit Court in two towns in Jasper County, viz.: at Carthage, and at Joplin.

"I would like to have your opinion in regard to a criminal case that happens in Galena or Joplin Township, where the next regular term is at Carthage, as to whether that case should be certified to Carthage as per Section 3893; or, as to whether it should be certified to Joplin as per the Session Laws of 1877, which Law was included in the Statutes of 1879.

Honorable Dale Tourtelot

"This Section was dropped from the Statutes of 1889, and has not appeared in the Statutes since 1879.

"The question is, does this Special Law passed in 1877 govern as to where the proceedings are certified?"

Section 1159, R. S. Mo. 1879, in connection with the Townships of Galena and Joplin, states in part as follows:

" * * * And it shall be the duty of justices of the peace, and other committing magistrates in the townships of Joplin and Galena, in said county, when committing any person charged with a criminal offense, or taking a recognizance, to certify the proceedings in such cases to the first term, next ensuing, of the circuit court, to be held at the city of Joplin, as aforesaid: * * * "

This section has been revised by every session of the Legislature since that time up to and including the Session of 1921, and each session probably attempted to repeal, at least by implication, the law passed by the former session. However, Section 1159, R. S. Mo. 1879, had never been specifically repealed until the Session Acts, 1921, page 248.

We have traced the course of Section 1159, R. S. Mo. 1879, and find that it was carried forward and that in the Revised Statutes of Missouri, 1919, that section was numbered 2524. We further find that in the Laws of 1921, page 248, Section 2524, R. S. Mo. 1919, was specifically repealed, and reads in part as follows:

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"Section 1. Repealing 39 sections, 2499 to 2537, both inclusive, of article 3, chapter 21, and enacting 36 new sections in lieu thereof.--That sections * * * * 2524, * * * * of article 3 of chapter 21 of the Revised Statutes of Missouri, 1919, relating to circuit courts and the time of holding regular terms thereof, be and the same are hereby repealed, and 36 new sections enacted in lieu thereof."

Honorable Dale Tourtelot

As you stated in your letter, Section 3893, R. S. Mo. 1939, is to the effect that the cases shall go to the next regular term of the Circuit Court. That section now is numbered 544.250 in the Revised Statutes of Missouri, 1949.

CONCLUSION

It is, therefore, the opinion of this department that criminal cases happening in Galena or Joplin Townships would be certified to the Circuit Court the same as any other township in the County of Jasper under Section 544.250, R.S.Mo. 1949.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WBD:VLM

Motor Vehicle Fuel Tax.

County not entitled to a refund of motor vehicle fuel tax by virtue of being a subdivision of the State. County entitled to refund of motor vehicle fuel tax if fuel is not used to operate a motor vehicle over a public road as such terms are defined by the taxing statute.

February 27, 1951.

Hon. J. W. Thurman,
Prosecuting Attorney
Jefferson County,
Hillsboro, Missouri.



3-6-51

Dear Sir:

In reply to your recent request for an opinion from this office you state your request as follows:

"I am furnishing you herewith copy of a letter written by the County Clerk of this county to the Office of the State Inspector of Oils of Jefferson City, together with a copy of his reply thereto.

"It is the opinion of the Court that they should be entitled to a refund of the gasoline tax paid on all gasoline used in their tractors and road grading equipment under and by virtue of the provisions of Section 142.030 (5), which provides:

"'No tax shall be imposed, charged or collected with respect to the following:***
(5) Motor fuel used by any licensed distributor for any purposes other than the generation of power for the propulsion of motor vehicles upon the public highways.'

"It is the court's opinion and I concur therein, that only the gasoline used to propel the trucks of the County Highway Department should be subject to the imposition of this tax. Or, in other words, the county should be entitled to a refund of the tax paid on all gasoline used in any of their equipment other than their motor trucks.

"We should be glad to have your opinion on this subject."

The letters to which you refer addressed to the State Inspector of Oils and his reply read as follows:

2-27-51

"The Jefferson County Court has requested me to write you regarding a refund on state gasoline tax paid by the County for the operation of County road equipment used in the maintenance and building of County roads.

"According to Form eight Revised Dec. 1, 1943, Sec. 17, the original customers invoice shall contain the 'name and address of purchaser (which must be the name of the claimant)'. This request would be difficult for the court to fulfill for the reason that the gasoline would be delivered to various jobs over the County and signed for by the Highway Engineer or a road foreman acting as an agent for the County, and the claim for the refund would be made by the Presiding Judge of the County Court. Under this arrangement it would be impossible for the claimants name to be the same as the name of the person who signs the invoice.

"Also, the affidavit portion of the application blank contains the following language 'and that no portion of such Motor Vehicle Fuel has been or will be used on the public roads of the State of Missouri'. Does this mean that the gasoline used by county trucks and other equipment is not exempt if used on public roads of the State of Missouri? It would be very difficult for county rolling equipment to move from job to job and haul gravel from distant points without using public roads of the State of Missouri.

"The County Court will be pleased to receive an explanation of this application for refund with reference to it's relationship to tax refund for gasoline used by County trucks and equipment in the maintenance and repair of County Roads."

"For your information we wish to advise that no county court or any political subdivision is entitled to a refund on gasoline when used to build or maintain streets, roads, or highways.

"In fact there is no refund on gasoline used for highway purposes regardless of who uses it. The Highway Department, Highway Patrol, and all state-owned vehicles pay this tax.

"Hoping this will clarify the situation, I remain, "

2-27-51

The Revised Statutes of Missouri, 1949, Sections 142.010 to 142.350 levy a tax on Motor Vehicle Fuel; included therein as a type of fuel on which the tax is levied is gasoline; Sections 142.360 to 142.490 levies a Motor Fuel Use Tax which includes such fuels as Butane and diesel oil used for propelling motor vehicles. For an understanding of these taxing statutes you should keep in mind there are two different taxing provisions with a different method of collection provided for each tax and a different method of refund provided.

The section to which you direct our attention relates to an exemption allowed to a licensed distributor, under the Motor Vehicle Fuel Tax; a licensed distributor is defined by Section 142.010 (3) RSMo. 1949, as any person holding an unrevoked distributor's license issued by the collector of revenue. There appears to be no relation between the section quoted in your letter and the question presented by you, unless your county is a licensed distributor of motor fuel.

As I understand the question presented by the correspondence quoted above your question may be restated as follows: Is a County, acting through the county court, entitled to a refund of the tax imposed as the Motor Vehicle Fuel Tax (Chapter 142, RSMo. 1949) on gasoline which the county has purchased and used in equipment used in the construction, repair and maintenance of county roads?

In an opinion rendered by this office dated June 6, 1945, to Mr. George Metzger, then State Inspector of Oils, this office ruled that a county of this state was not exempt from the payment of the motor vehicle fuel tax by virtue of being a political subdivision of the state. This opinion did not discuss the question of whether the county would be exempt from payment of the tax by virtue of using the fuel for "non-highway use", but only held that a county was not exempt by virtue of being a political subdivision of the state.

This office further ruled in an opinion dated October 24, 1949, addressed to Mr. Duncan R. Jennings, Prosecuting Attorney for Montgomery County, that a county is not required to pay the Motor Fuel Use Tax for fuel used or consumed by an internal combustion engine in the repair and maintenance of county roads. A copy of that opinion is enclosed; you will note that opinion deals with the Motor Fuel Use Tax which includes such fuels as diesel oil and butane but does not include gasoline, which is included under the Motor Vehicle Fuel Tax.

In order to answer the question presented by your opinion request it is necessary for us to construe the statute here involved, keeping in mind the intent of the legislature in enacting the stat-

ute as that intent is expressed in the Act levying the tax. A primary rule in the construction of statutes was stated by the Supreme Court of Missouri in the case of American Bridge Co. v. Smith, 179 S.W. (2d) 12, 1.c. 15, as follows:

"The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object,* * *".

Following the above-quoted rule we refer to the Motor Vehicle Fuel Tax Act as a whole (Chapter 142, RSMo. 1949) and particularly to certain sections within that chapter that have relevancy to your question.

Section 142.010 defines the motor vehicle fuel subject to the tax in question in the following words:

"When used in this law the following words shall have the meaning indicated:

'(4) MOTOR FUELS,'

(a) All products commonly or commercially known or sold as gasoline (including casing-head and absorption or natural gasoline) regardless of their classifications or uses; and

(b) Any liquid which when subjected to distillation in accordance with the standard method of test for distillation of gasoline, naphtha, kerosene and similar petroleum products (American Society for Testing Materials designation D-86) shows not less than ten per cent distilled (recovered) below three hundred forty-seven degrees Fahrenheit (one hundred seventy-five degrees centigrade) and not less than ninety-five per cent distilled (recovered) below four hundred sixty-four degrees Fahrenheit (two hundred forty degrees centigrade); except that the term "motor fuels" shall not include naphthas and solvents, as defined in subdivision (6) of this section; liquefied gases which would not exist as liquids at a temperature of sixty degrees Fahrenheit and a pressure of fourteen and seven-tenths pounds per

square inch absolute; denatured wood or ethyl alcohol, ether turpentine, or acetates and products having a Reid vapor pressure of thirty pounds or more at one hundred degrees Fahrenheit except when such naphthas and solvents, liquefied gases, denatured wood or ethyl alcohol, ether, turpentine or acetates and products having a Reid vapor pressure of thirty pounds or more at one hundred degrees Fahrenheit, are used as an additive in the manufacture, compounding, or blending of a liquid within (a) or (b) above, in which event the quantity so used shall be deemed to be motor fuel."

Subdivision (5) of this section defines a "motor vehicle" as follows:

"(5) 'Motor vehicle,' all vehicles except those operated on rails, which are propelled by internal combustion engines or motors and are used or are designated for use in the transportation of a person or persons or property upon public highways."

Subsection (8) of this section defines "Political subdivisions of the state" in the following words:

"(8) 'Political subdivisions of the state', as used herein is intended to be all inclusive and shall include any county, township, road district, sewer district, school district, municipality, town or village, or any other public corporation, whether of like character as those heretofore enumerated or not, that is an agency for the administration of civil government."

This subsection (8), read in conjunction with subsequent sections does not exempt political subdivisions of the state from liability to the tax.

Subsection (9) of this section defines "public highways" in the following words:

"(9) 'Public highways,' every way or place of whatever nature, generally open to the use of the public as a matter of right, for the purposes of vehicular travel, and notwithstanding that the same may be temporarily closed for the purposes of construction, reconstruction, maintenance or repair."

Section 142.020 RSMo. 1949, imposes the tax, provides for its collection and delineates the purposes of levying the tax as follows:

"1. In order to provide funds for the construction and maintenance of the public highways of this state and to pay the principal and interest on the road bonds of the state there is hereby provided for a license tax to produce a sum equal to two cents on each gallon of motor fuel used in propelling motor vehicles upon the public highways of Missouri to be collected as herein provided.

"2. For the privilege of receiving motor fuel to be sold for use in propelling motor vehicles upon the public highways of this state, there is hereby imposed upon every person receiving fuel in this state, a license tax equal to two cents per gallon on all motor fuel received to be sold for use in propelling motor vehicles upon the public highways of this state. It shall be presumed that all motor fuel received in this state is to be sold for use and will be used in propelling motor vehicles upon the public highways.

"3. The distributor receiving motor fuel in this state shall be liable for said license tax on the gross number of gallons of fuel received by him as shown by invoices thereof less deductions in this law provided for, and shall pay said license tax to the collector of revenue.

"4. Every distributor who shall receive motor fuel in this state, shall, except as otherwise provided in section 142.030, upon selling such fuel, add to the selling price of each and every gallon of such fuel the per gallon amount of said tax and collect the same from the purchaser thereof. Thereafter, except as otherwise provided in section 142.030, if said fuel is again sold the per gallon amount of the tax shall be added to the selling price of the fuel by any person who shall sell the same, and shall be collected from the purchaser, and so on, so that the ultimate consumer shall bear the burden of the tax as a part of the price of the fuel he purchases.

"5. Every person purchasing motor fuel in this state from any distributor or other person, shall pay, except as otherwise provided in section 142.030, to the distributor or other person from whom said fuel is purchased, the amount of the license tax which the distributor or other person is required by this chapter to add to the selling price of the motor fuel. It shall be presumed that all fuel purchased by any person in this state is intended to be used and will be used to propel motor vehicles upon the public highways of this state.

"6. All money collected by any distributor as a part of the sale price of fuel, that is added to the selling price to cover the license tax required to be so added by this chapter, shall, be and remain, except the three per cent allowance authorized in subdivision (1) (b) of subsection 1 of section 142.140, public money, the property of the state of Missouri, unless and until the distributor collecting said money shall pay to the collector of revenue the license tax imposed upon him that is measured by the receipt of the fuel which he sold and upon which sale the money was collected."

Section 142.030 RSMo. 1949 specified the exemptions allowed from this tax as follows:

"No tax shall be imposed, charged or collected with respect to the following:

"(1) Motor fuel exported or sold for export from this state to any other state, territory, or foreign country, except in the usual and ordinary fuel supply tank connected with the engine of a motor vehicle leaving this state;

"(2) Motor fuel sold to the United States of America or any agency or instrumentality thereof;

"(3) Motor fuel sold to any post exchange or concessionaire on any federal reservation within this state; but the tax on motor fuel so sold, to the extent permitted by federal law, shall be paid to the state by such post exchange or concessionaire;

"(4) Motor fuel sold to any person for use in the performance of any such person's cost-plus-a-fixed-fee or fixed percentage contract with the United States, or cost-plus-a-fixed-fee or fixed percentage contract under such contract, for the construction, manufacture or operation of the United States government defense projects connected with the prosecution of any war declared by congress;

"(5) Motor fuel used by any licensed distributor for any purposes other than the generation of power for the propulsion of motor vehicles upon the public highways.

"(6) Motor fuel received by any licensed distributor and thereafter lost or destroyed while such distributor is the owner thereof as a result of theft, leakage, fire, accident, explosion, lightning, flood, storm, act of war, or public enemy, or other like cause;

"(7) Sales or exchanges of motor fuels between licensed distributors, as provided in subsection 2 of section 142.040."

Section 142.230 provides for a refund of the motor fuel tax to a person (and by definition of "person" in section 142.010 (7) a county would be included) who shall buy and use motor fuel for non-highway use as follows:

"1. All motor fuels distributed or sold in this state by any person shall be presumed to have been sold for use in propelling motor vehicles upon the public highways of this state.

"2. Any person who shall buy and use motor fuel for any purpose whatever, except in the operation of motor vehicles upon the highways of this state, who shall have paid or have had charged to his account the license tax required by this chapter to be paid, either directly or indirectly through the amount of such tax being included in the price of the fuel, shall be reimbursed and repaid the amount of the tax, upon presenting a claim therefor to the collector of revenue.

"3. The claim to the collector of revenue shall be in the form of an affidavit, stating the purpose for which the fuel was used, and shall be supported by the original sales slip or invoice covering the purchase of the fuel. The term 'original sales slip or invoice,' as used herein, shall mean the top copy and not any duplicate original or carbon copy of the invoice or sales slip. The original sales slip or invoice, must bear the following legend: 'This is customer's invoice,' or some similar legend, and shall in addition contain the following information:

- (1) Date of sale;
- (2) Name and address of purchaser,
which must be the name of the claimant;
- (3) Name and address of seller;
- (4) Number of gallons purchased and price
per gallon;
- (5) Missouri motor fuel tax, as a separate item.

"4. The forms upon which claims are to be made shall be prescribed by the collector of revenue, and he shall keep the clerks of the county courts and the comptroller of the city of St. Louis supplied with quantities of said forms.

"5. No claim for refund of motor fuel tax under this section shall be allowed unless the supporting original invoice or sales slip indicates on its face that the purchaser at the time of purchase declared to the seller of said motor fuel his intention to use the motor fuel thus purchased for purposes other than the propelling of motor vehicles upon the public highways of this state, and declared his intention to claim a refund of the tax paid as a part of the purchase price of the fuel. As evidence of this declaration of intention, the seller of the fuel, at the time of the sale, shall indicate, by stamp or otherwise, on the face of the original invoice or sales slip, a certification that such declaration of intention was made. The certification shall be in substantially the following form:

"The undersigned, as agent for _____, the seller, hereby certifies that the purchaser of the motor fuel invoiced hereon at the time of purchase expressly declared it as his intention to use such motor fuel for a

purpose other than propelling motor vehicles upon the public highways of this state, and declared his intention to file a claim for refund of the tax included in the purchase price.

Agent for Seller.'

"6. All applications for refunds under this section must be filed with the collector of revenue within one hundred and twenty days of the date of purchase, as shown on the original invoice or sales slip. Upon the receipt of such affidavit and invoice or sales slip, the collector of revenue, upon approving the same, shall cause the amount of the tax that such claimant paid to be refunded by a requisition upon the state comptroller, supported by the claim, for a warrant upon the state treasurer, payable to said claimant. The warrant shall be paid by the treasurer out of any funds appropriated by the legislature for such purpose."

Since this section creates a presumption that all motor fuels as defined by this chapter which are distributed or sold in this state have been sold for use in propelling motor vehicles upon the public highways of this state, the burden is upon the purchaser of such fuels to establish that he is entitled to a refund of any tax paid at the time of purchase.

Your attention is particularly invited to paragraph 2 of section 142.230 which is underscored in the above quotation and provides that any person who shall buy and use motor fuel for any purpose whatever, except in the operation of motor vehicles upon the highways of this state who has paid the tax shall be reimbursed and repaid the amount of the tax. A "motor vehicle" as defined by paragraph (5) of section 142.010 quoted above includes all vehicles, except those operated on rails, which are propelled by internal combustion engines or motors and are used or designed for use in the transportation of a person or persons or property upon public highways. Motor fuel which is used in a motor or engine which is not included within the definition of the statute would not be subject to the tax and a refund thereon should be made as provided by the statute for making refunds. This would include all equipment used by the county in constructing or repairing roads which is not designed to be used for transportation of persons or property upon the roads. Whether such equipment is so designed or used is a question of fact.

By the provision of this paragraph any person who shall use motor fuel as defined by this act for any purpose whatever, except in the operation of motor vehicles upon the highways of the state who shall have paid the tax should be reimbursed and repaid the amount of the tax as provided by the statute.

Whether or not one is using the highways as defined by this section for the purpose of operating a motor vehicle thereon is also a question of fact.

Hence, before a person is entitled to a refund of the tax paid under this motor fuel tax act by virtue of section 142.230 it must be shown that the person requesting the refund has not used the motor vehicle fuel in the operation of a "motor vehicle" upon the highways of this state. Any fuel used in motor vehicles engaged in hauling materials over the public roads even though such materials are to be used in the repair, maintenance, or construction of roads would be subject to the tax. It also follows that fuel used in internal combustion engines or motors which are not being operated over roads or streets is not subject to the tax imposed by this act.

We are unable to find a case decided in this state directly discussing the question herein involved. However, in the case of State ex rel Winn v. Banks, 145 S.W.(2d) 362; 346 Mo. 1177, the state Supreme Court had for consideration an action to collect the tax on gasoline and in that case said at l.c. 365:

"It is apparent, from reading the provisions of these sections together, as they now stand, that the intention of the legislature was to require the payment of two cents on each and every gallon of gasoline sold or used in this state to operate motor vehicles over the roads, streets or highways of this state."

This intention is expressed by section 142.020, quoted supra, which levies the tax on "each gallon of motor fuel used in propelling motor vehicles upon the public highways of Missouri."

The answer to your question then depends upon whether the fuel is being used in a "motor vehicle" as defined by the taxing statute and second whether such motor vehicle is propelled or operated over a public road.

The basis for refund of the tax imposed by this act is not that the motor fuel is being used in the repair, maintenance or construction of a public road but whether the motor fuel is being used to operate a motor vehicle as defined by this act over a road dedicated to public use. If the motor fuel is not being used to operate such a motor vehicle over a public road it appears

the Legislature has expressed the intention that it should not be subject to the motor fuel tax and in those cases in which such tax has been paid a refund should be made. The determining factor is not that the motor fuel is being used in the repair, construction or maintenance of a road but whether it is being used to operate a motor vehicle over a public road.


CONCLUSION.

A county is not entitled to a refund of the tax imposed by the Motor Vehicle Fuel tax on gasoline used in trucks and equipment used in maintaining, repairing or constructing public roads by virtue of being a political subdivision of the state. However, a person, including a county, who uses motor fuel on which the motor vehicle fuel tax has been paid is entitled to be reimbursed and repaid such tax upon establishing that such fuel was not used to operate or propel a motor vehicle, as defined by the taxing statute, over a public road. If the motor fuel is being used to operate a motor vehicle designed to be used for carrying persons or property over a public road then such fuel is subject to the tax imposed by the motor vehicle fuel tax, sections 142.010 to 142.350 RSMo. 1949. If the motor fuel is not being used in equipment defined as a motor vehicle and is not being operated or propelled over a public road then upon establishing such fact the county is entitled to a refund of the tax paid by it.

Respectfully submitted,

JOHN E. MILLS,
Assistant Attorney General.

APPROVED:



J. E. TAYLOR
Attorney-General.

JEM/ld

COUNTY COURT:
AUTHORITY TO
APPOINT GENERAL
SUPERINTENDENT OF
HIGHWAY DEPARTMENT:

There is no statute authorizing county court to
create the office of "General Superintendent"
of County Highways.

March 22, 1951

3-22-51

Honorable J. W. Thurman
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

FILED

89

Dear Mr. Thurman:

We have your letter requesting an opinion of this Department. Your letter is as follows:

"Warren Lynch was the duly elected, qualified and acting Highway Engineer during the period Mr. Hauck was on the county payroll. The Court however, at the beginning of the term designated Mr. Hauck as the General Superintendent of the Highway Department and fixed his salary at \$300.00 per month 'and transportation is to be furnished'. Mr. Lynch's salary as County Highway Engineer throughout said period is fixed at \$200.00 per month. Pursuant to the making and entering of the order appointing Mr. Hauck he assumed the duties as General Superintendent and was active in this capacity throughout the period. I understand that part of the time he used his own motor vehicle for transportation and a part of the time he used the county truck. Mr. Hauck and Mr. Lynch coordinated their activities in the operation of the County Highway Department during this period."

We also have your letter of March 19, 1951, which supplements your above quoted letter. Your said supplemental letter is here quoted as follows:

"Upon receipt of your letter of March 14 I have contacted Mr. Lynch, the County Highway Engineer and Surveyor and who acted in the same capacity during the two year period involved when Mr. Hauck was

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Road Superintendent I find I was in error as to the salary paid Mr. Lynch. He tells me that the sum of \$2000.00 per year was his salary and that he had an additional allowance of not to exceed \$100.00 per month as travel expenses.

"Mr. Lynch further tells me that he was in charge of road construction during the period in question. His duties as such were to determine the places that work would be done and the machinery that would be used and the men that would be employed on such construction, but that the actual superintending of the work was done by Mr. Hauck. He further tells me that both he and Mr. Hauck had the right to hire and fire, subject of course to the approval of the County Court; that no difficulty ever arose over the hiring or firing.

"He further tells me that Mr. Hauck used the County truck approximately 90% of the time during this period and that when he used his own truck he used County gasoline therein."

We are enclosing herewith an opinion of this office under date of January 18, 1949, addressed to Honorable Roderic R. Ashby, prosecuting attorney of Mississippi county in which we held that section 8655, Laws of Mo. 1945, p. 1493, which section is the same as section 61.160, RSMo 1949, which said section is here quoted as follows:

"The county courts of each county in this state in classes two, three and four are hereby authorized and empowered to appoint and reappoint a highway engineer within and for their respective counties at any regular meeting, for such length of time as may be deemed advisable in the judgment of the court at a compensation to be fixed by the court. The provisions of sections 61.170 to 61.310 shall apply only to counties of classes two, three and four."

does not authorize the county court to employ a county foreman to perform the duties of the county highway engineer. We are of the opinion that the enclosed opinion is applicable to the facts submitted in your opinion request for the reason that according to information contained in your letter under date of January

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19, 1951, the man whom the county court of Jefferson county sought to appoint as "general superintendent of the Highway Department" actually performed some of the duties of the county highway engineer and all of his work seems to have come within the scope of duties assigned to the county highway engineer by the statute. Your letter indicates that your information is that the actual superintending of highway construction was done by the man above mentioned.

Section 61.220, RSMo 1949, is here quoted, in part, as follows:

"The county highway engineer shall have direct supervision over all public roads of the county, and over the road overseers and of the expenditure of all county and district funds made by the road overseers of the county. He shall also have the supervision over the construction and maintenance of all roads, culverts and bridges. * * *"


We are of the opinion that it is obvious from the above quoted portions of said section that the superintending of county highway construction is a duty of the county highway engineer. We might add that we find no other statute which authorizes the county court to make such an appointment.

CONCLUSION

We are accordingly of the opinion that the appointment sought to be accomplished by the order of the county court of Jefferson county purporting to make the appointment of a general superintendent of the Highway Department is void and that therefore the payment of the warrant for \$2400.00 drawn on the road funds designated as payment of a mileage bill is illegal and void.

Respectfully submitted,

APPROVED:


J. E. TAYLOR
Attorney General

SAMUEL M. WATSON
Assistant Attorney General

SMW:mw

CORRECTED PATENTS
TO STATE LANDS:

Secretary of State cannot issue corrected patents to any person or persons other than the original patentee or some person or persons who own the entire tract intended to have been described in the original patent.

May 7, 1951

5-7-51
FILED

89

Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Dear Sir:

We have your recent letter in which you request an opinion of this department. Your letter is as follows:

"On January 3, 1951, you gave us a written opinion in response to our request. The substance of this request is here quoted as follows:

"We have had a request in this office for a land patent which appears incomplete on the original patent.

"Attached find photostatic copy of the original patent issued to William McFarland of the County of Greene, covering a part of the Internal Improvement Land, or the 500,000 Acre Grant. You will note an erasure or eradication has been made which changes the original description of the land.

"The Register of Land Sales by the General Land Office, in 1850, shows that the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$, Sec. 13, Twp. 28, Range 21, was sold to William McFarland; the Index covering all the Internal Improvement Lands also shows it to be the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$, Sec. 13, Twp. 28, Range 21.

"The present owner of this land wants a corrected patent issued in lieu of the one on file in this office.

"Please give us your opinion as to whether

Hon. Walter H. Toberman

or not this original patent may be corrected and, if so, in what manner."

"As you may observe from the quotations we told you that the present owner of the land wanted a corrected patent issued in lieu of the one on file in our office. With this understanding you held that Section 12715, R.S.A. Mo. 1939 was applicable and that the present owner of the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$, Sec. 13, Twp. 28, Range 21, is entitled to a corrected patent to said land.

"On February 19, 1951, we transmitted to you a copy of letter from Mr. Arthur Luna and also a copy of affidavit prepared in accordance with the above opinion along with our request that you render an opinion as to whether or not the prerequisites of the opinion have been met.

"On March 6, 1951, you replied to the effect that you were convinced, upon examination of the above mentioned copy of affidavit, that the land originally intended to be conveyed in the original patent has been divided into parcels and that the equitable title to each portion has been conveyed by mesne conveyance to several different owners.

"It is our understanding that a part or all of the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$, Sec. 13, Twp. 28, Range 21, is the subject of a real-estate sale, but that consummation of the sale is dependent upon the issuance or correction of patent.

"Since you have not thus far expressed an opinion that the owner of only a portion of the land in question is entitled to a corrected patent, we now desire an opinion as to whether or not the owner or owners of a portion less than a whole of a tract of land originally bought from the State of Missouri but never patented because of a mistake in description in the original patent by which it was intended to convey the tract in question to the person who purchased from the state is entitled to a corrected patent to said portion less than a whole of the entire tract.

"In the event that your reply should be that such

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an owner, or such owners of a portion of the tract, is entitled to a corrected patent, we wish further an opinion as to whether or not the enclosed affidavit submitted to us by the applicant for the corrected patent is sufficient compliance with the requirement of your opinion of January 3, 1951, to warrant this office in issuing the patent.

"In the event that you are forced to the opinion that patents cannot be issued piecemeal as indicated above, would you kindly advise what requirement would have to be met for issuance of patent covering all of the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ Sec. 13, Twp. 28, Range 21, despite the fact that the land and ownership thereof has now been broken down into sundry parcels. In other words, is there any method by which patent can be issued for the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ Sec. 13, Twp. 28, Range 21, without the complete ownership thereof being in one individual. If so, kindly state what requirement must be met."

A reading of the letter above quoted immediately suggests that the important question involved is whether or not an owner of only a portion of the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Sec. 13, Twp. 28, Range 21, is entitled to have a corrected patent issued to him covering his particular portion. In other words, whether or not in the event the tract has been subdivided each owner of a lot or a parcel of said tract would be entitled to a corrected patent for his particular lot or parcel under the provisions of Section 12715, Mo. R.S.A. 1939, quoted in our opinion of January 3, 1951, being the same as Section 446.180, RSMo 1949, which is quoted as follows:

"In cases where errors shall have been made in the description of lands in any patent heretofore made, the person to whom such patent has been issued, or any person who has acquired the title to the land intended to be described in said erroneous patent by mesne conveyances from the persons to whom such erroneous patent has been issued, may have a new patent issued, correctly describing such land upon first making proof that he or some one under whom he claims purchased from the state the land to which he desires a corrected patent, and that the state has been paid for the same by affidavits or otherwise to the satisfaction of the secretary

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of state, and, second, filing his affidavit that he sets up no claims to the land described in the patent sought to be corrected, and that neither he, nor any one by, through or under whom he claims has ever set up any claim to such land under or by virtue of said patent; and upon producing said affidavit to the secretary of state, the correction asked shall be made and a new patent shall be issued correctly describing the said land, upon the delivering up of the erroneous patent, or upon the applicant showing to the secretary of state by the affidavits of two disinterested householders of the township in which said land is located, that the applicant and those under whom he claims title have been in the open, notorious, exclusive, continuous, adverse and hostile possession of all of said lands for the period of ten years last past prior to the time of filing said application, and that during said period of time no person has ever set up or made any claim to said land or any part thereof, hostile or adverse to the title of the applicant and those under whom he claims, and shall execute a deed releasing the erroneously patented land to the state; provided, however, that the records in the office of the secretary of state shall show that the land is state land, and has not been disposed of to any other person; provided further, that all such proofs aforesaid shall be filed in the land department of the secretary of state and preserved among the records thereof."

In deciding this question we call attention particularly to the following words from the above quoted section:

"In cases where errors shall have been made in the description of lands in any patent heretofore made, the person to whom such patent has been issued or any person who has acquired the title to the land intended to be described in said erroneous patent by mesne conveyances from the persons to whom such erroneous patent has been issued, may have a new patent issued, correctly describing such land * * *"(Underscoring ours).

With the above language in view, we call attention to the

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fact that the right on the part of anybody to a corrected patent rests solely on the above quoted statute and in defining said right and outlining the limitations thereof, we are of the opinion that the statute must be strictly construed. That being true we are of the further opinion that no person, or persons, who do not have title to all of the land intended to be conveyed and described in the erroneous patent is entitled to a corrected patent for the reason that the statute in naming the persons entitled to said corrected patent clearly designates such persons to be either the person to whom the original erroneous patent was issued or any person who has acquired title to the land intended to be described in the erroneous patent by mesne conveyances from the original owner. We are of the opinion that when the statute mentions any person who has acquired title to the land intended to be described it means exactly that and does not mean any person who has acquired title to a portion of the land intended to be described. We are therefore of the opinion that a corrected patent can be issued only to the original patentee or to persons who have acquired the ownership of all of the land originally intended to be patented by mesne conveyances from the person who bought same from the state. We suggest that this is of course entirely consistent with our opinion of January 3, 1951, in which opinion we held in our concluding paragraph that the person in whom the equitable title to the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Sec. 13, was vested was entitled to a new patent under the provisions of the aforesaid statute. We further suggest that any other construction of this statute might place quite a burden upon the state in drawing corrected patents. For instance, suppose the state had sought to issue a patent to a square mile of land and had erroneously described that land and suppose further that the land had been conveyed by mesne conveyances to an owner who subdivided it into three hundred parcels and sold each parcel separately. We suggest that under such circumstances it would be quite an undertaking for the state to issue a patent to each of these parcels separately and we are of the opinion that such was not the intention of the Legislature when it enacted the above quoted statute.

In your above quoted letter you indicate that in the event that we hold that corrected patents cannot be issued to owners of only a portion of the land originally intended to be patented, you desire our opinion as to whether there is any method by which a patent can be issued if the land is divided into more than one parcel. In response we state that we are of the opinion that in view of the statute as it exists the only way that a corrected patent could issue to a given tract of land intended to have been conveyed in an original patent would be for the several parcels which, taken together, constitute the whole of the tract originally intended to be conveyed, to be assembled under one ownership in which

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event a corrected patent could be issued to the owner of the whole tract upon compliance with the provisions of the statute as outlined in our aforesaid opinion of July 3, 1950.

CONCLUSION

We are accordingly of the opinion that a corrected patent can be issued only to, (1) the original patentee, or (2) the owner, or owners, of the whole of the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$, which is the tract originally intended to be conveyed, and we are of the further opinion that if said SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of said Sec. 13, is now divided into parcels, each parcel being owned by a different owner or set of owners, that the owners of the respective parcels cannot obtain a corrected patent under the section above quoted or any other section of our statutes. However, if all of the separate tracts, which, in the aggregate, constitute the whole of the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of said Sec. 13 shall be assembled under one ownership the then owner of the whole of the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of said Sec. 13 may be granted a corrected patent if the provisions of the above quoted statute, as set forth in our aforesaid opinion of July 3, 1950, are complied with.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SMW:mw

COUNTY COURTS:
MILEAGE:

County Court Judges in counties of the third class shall receive 5¢ per mile for each mile necessarily traveled in going to and returning from the place of holding county court, and no other mileage.

May 8, 1951

5-8-51

Honorable B. C. Tomlinson
Prosecuting Attorney
St. Francois County
Farmington, Missouri



Dear Sir:

This department is in receipt of your request for an official opinion. You thus state your opinion request:

"I would like an official opinion from your office with reference to the following state of facts:

"In a county of the third class it often becomes necessary for a Judge of the County Court to make trips in and about the county and to other places in order to perform his official duties. Section 49.100 R. S. Mo. 1949 provides travel expenses for county judges in counties of class two. In *Rinehart v. Howell County*, 153 S.W. (2d) 361 it was pointed out that the General Assembly authorized and established salaries for stenographic services to prosecuting attorneys in the larger counties of the State but did not provide for like services in counties the size of Howell County and yet the Supreme Court held that a prosecuting attorney in any size county was entitled to reimbursement by the county for reasonable sums paid for necessary stenographic services. In *Ewing v. Vernon County*, 216 Mo. 681 it is stated at page 695: 'Where the law requires an officer to do what necessitates an expenditure of money, for which no provision is made, he may pay therefor and have the amount allowed him.' Would not the same reasoning apply to a county judge who is required to

Honorable B. C. Tomlinson

make trips in his automobile that are necessary and essential in order for him to perform his official duties?"

Section 49.110, RSMo 1949, including caption, states:

"Per diem, mileage, and fees of judges in counties of class three-effective date.- In all counties of the third class in this state, the judges of the county court shall receive for their services the sum of ten dollars per day for each of the first five days in any month that they are necessarily engaged in holding court and shall receive five dollars per day for each additional day in any month that they may be necessarily engaged in holding court, and shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court. The per diem compensation herein fixed shall be paid at the end of each month and the mileage compensation shall be paid at the end of each month on presentation of a bill, by each of the respective county judges setting forth the number of miles necessarily traveled; provided, however, that this increase in compensation shall not become effective during any county judge's present term of office."

You will note that the above section, in respect to the mileage which county court judges in counties of the third class shall receive, states: "and shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court."

The above is the only Missouri statute pertaining to the matter of mileage for county court judges in counties of the third class.

It will be observed that Section 49.100, RSMo 1949, which relates to county court judges in class two counties, allows five cents per mile for travel in performance of duty, while Section 49.120, RSMo 1949, which relates to class four counties, allows county court judges only mileage for going to and returning from court once for each regular term, and not

Honorable B. C. Tomlinson

over eight times per year for special and adjourned terms. From the above, it would appear to have been the intention of the Legislature to reduce this item of mileage progressively from class two counties down through class four counties.

It is well established in this state that statutes providing for compensation in a particular mode or manner must be strictly construed against the public officer and that a public officer claiming compensation for official duties must point out the particular statute authorizing such payment.

In the 1939 case of Nodaway County v. Kidder, 129 S.W. 2d 857, 1.c.860, the Court stated:

"(5-7) The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S.W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S.W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

"(8) It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645."

In your letter you refer to the 1908 case of Ewing v. Vernon Co., 216 Mo. 681, and to that portion of the opinion in that case which states, 1.c. 695:

"The conclusion we have come to comports with the general doctrine announced in 23 Am. and Eng. Ency. Law (2 Ed.), 388.

Honorable B. C. Tomlinson

'Where,' say the editors of that standard work, 'the law requires an officer to do what necessitates an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed him. Prohibitions against increasing the compensation of officers do not apply to such cases. Thus, it is customary to allow officers expenses of fuel, clerk hire, stationery, lights, and other office accessories.'"

We are inclined to believe that the above case would be too remote in application to be controlling in the instant case in any event, and in view of the Nodaway County case referred to above, we believe that it very clearly would not be applicable in the instant case where a specific statute (Section 49.110, RSMo 1949) was plainly meant to apply to the situation involved. The statute referred to above, we believe, is clearly one of limitation as well as of allowance. For the same reason that we believe the Ewing case to be inapplicable, do we believe that the Rinehart case, also mentioned by you, does not apply in the instant case.

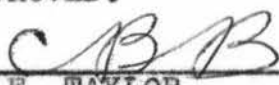
CONCLUSION

It is the opinion of this department that county court judges in counties of the third class shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court, and no other mileage.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

HPWab

NEW PATENT TO STATE
LAND UNDER SECTION
446.180, RSMo 1949:

Documents submitted constitute sufficient
evidence to warrant issuance of patent.

June 6, 1951

6-7-51



Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Dear Mr. Toberman:

We acknowledge receipt of your letter of June 1, 1951, in which you request an opinion of this department. Your letter is as follows:

"Since you have passed on this matter previously and the situation has been so complicated, we would like for you to review the enclosed letter from Stewart and Turner, Attorneys in Springfield, Missouri, affidavits and quit claim deed and advise if in your opinion a patent may now be issued to May Kelsay by mesne conveyance from William McFarland. An old quit claim deed to this land executed by H. Clay Ewing and I.L. Smith to Wm. A. McFarland is also enclosed."

Your inquiry is whether the documents transmitted with your said letter constitute sufficient evidence to warrant your issuing the patent desired by the person applying therefor. The documents mentioned include three affidavits, one from May Kelsay, the person who now owns the whole of the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$, of Section 13, Township 28, Range 21, Greene County, Missouri by virtue of mesne conveyances from Wm. McFarland who originally purchased said land from the State of Missouri, and another from Ellis Gallaway, a householder, in the township in which the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of said Section 13 is located, and another from T.W. Jones, a resident of the same township, and also includes a quitclaim deed from May Kelsay in which she quitclaims to the State of Missouri the land described in the original patent which said patent described the wrong land. We have examined said documents submitted, having in mind the requirements of our opinion of January 3, 1951, and also of our opinion of May 7, 1951, which requirements are based upon Section 446.180, RSMo 1949, and we find all of said documents

Hon. Walter H. Toberman

in satisfactory form and we are of the opinion that they, taken together, constitute all of the evidence required by said section as prerequisite to the issuance of a new patent.

CONCLUSION


We are accordingly of the opinion that a new patent should be issued conveying the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$, Section 13, Township 28, Range 21, Greene County, Missouri, from the State of Missouri to May Kelsay (a single woman).

We are transmitting herewith all of the documents submitted.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

SMW:mw

SOCIAL SECURITY:
PROBATE COURT:
CITY OF ST. LOUIS:

Probate judge and employees of probate court, City of St. Louis, are under the political subdivision of the City of St. Louis under the provisions of S.C.S.S.B. No.3. *and may be incorporated in any agreement between the State Agency and City.*
July 25, 1951

7-27-51

Mr. Adolph Thym
Clerk of the Probate Court
City of St. Louis
St. Louis, Missouri



Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads:

"Senate Bill No. 3, providing old-age and survivors insurance coverage for certain officers and employees of the State and local governments, was recently approved by the Governor.

"The probate court of the City of St. Louis follows Sections 483.580 to 483.600, R.S. Mo. 1949 in its operation, solely on a fee basis. The procedure by the clerk of said court is to charge and collect, from the estates or parties requiring the services of the probate judge, clerk or court, fees which are deposited to the clerk's account, and at the end of each month, are reported to the City Comptroller and paid as reported to the City Treasurer. During the course of a year, semi-monthly payrolls are requisitioned out of the money so paid, and too, as is necessary, expenses for supplies and office equipment. Annually, the clerk reports a summation, and whatever excess fees remain are paid by the City Treasurer to the Board of Education for the school fund of this City. Precedent established by cases defines the probate court as a state office, and, as to the judge, clerk and deputy clerks, state officers.

Mr. Adolph Thym

"In view of the foregoing, will you kindly advise me if the judge and employees of the St. Louis probate court are entitled to participate in the benefits and do they come under the act, and what procedure will be necessary to include the probate judge and staff under the law for the purpose of the benefits provided therein, and if there is action required by the judge or clerk to effect that purpose."

Section 16, Article V of the Constitution of Missouri, 1945, provides that there shall be a probate court in each county and specifically designates the general duties of said court, and reads:

"There shall be a probate court in each county with jurisdiction of all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians, and the sale or leasing of lands by executors, administrators, curators and guardians, and of such other matters as are provided in this Constitution."

Section 17 of this same article provides that the probate courts shall be courts of record, and reads:

"Probate courts shall be courts of record and uniform in their organization, jurisdiction and practice, except that a separate clerk may be provided for, or the judge may be required to act ex officio as his own clerk."

Section 481.010, RSMo 1949, creates the probate court in the City of St. Louis and all other counties of the state, and reads:

"A probate court, which shall be a court of record, and consist of one judge, is hereby established in the city of St. Louis, and in every county in this state."

Mr. Adolph Thym

Section 26, Article V of the Constitution of Missouri, 1945, provides that appellate and probate courts shall appoint their own clerks. Section 481.090, RSMo 1949, is a mandate that the probate court shall be governed by the statutes, and reads:

"Probate courts, in the exercise of their jurisdiction, shall be governed by the statutes in relation to administration, to guardians and curators of minors and persons of unsound mind and such laws as may be enacted defining and limiting the practice in said courts."

Furthermore, Section 481.220, RSMo 1949, fixes the salary of the probate court. Section 483.585, RSMo 1949, provides that the salary of the probate judge and all employees shall be paid from fees of the office and shall not in any year exceed such fees. Section 481.230, RSMo 1949, requires that the probate judge, before entering upon his official duties, shall give a bond, and Section 481.060, RSMo 1949, provides for a seal of the office.

There are a great many decisions in this state as to the definition of the term "state officer." Some of these definitions hold that even a prosecuting attorney or a sheriff of a county is a state officer. Another long line of decisions holds that in order to constitute a state officer the jurisdiction of such an officer shall be co-extensive with the boundaries of the state.

From the text of S.C.S.S.B. No. 3, we have come to the conclusion that the bill contemplates that an officer or employee to be employed by the state, political subdivision or instrumentality must receive pay from the respective state, political subdivision or instrumentality. It is quoted from the bill as follows: (Section 2, Subparagraph 2.)

"* * * except that in making its first payment after the effective date of the agreement between the state and the federal security administrator the state shall pay to the Secretary of the Treasury contributions with respect to wages of covered state employees a sum equal to the amount which would have been due and payable had such agreement and this act been effective on January 1, 1951."

Mr. Adolph Thym

Again, in Section 3, Subparagraphs (2) and (3):

"(2) To require its employees to pay (and for that purpose deduct from their wages) contributions equal to the amounts which they would be required to pay under section 4 subsection 1 if they were covered by an agreement made pursuant to section 2 subsection 1; and

"(3) To make payments to the Secretary of the Treasury in accordance with such agreement, including payment from its own funds, and otherwise to comply with such agreements. Such agreement shall, to the extent practicable, be consistent with the provisions of this act."

And, in Section 4, Subparagraph 2:

"The contributions imposed by this section shall be collected by the state by deducting the amount of the contributions from wages paid, but failure to make such deductions shall not relieve the employee from liability for such contribution."

In regard to the agreement between the state agency and political subdivision or instrumentalities of the state or instrumentalities of political subdivisions, and again in contemplation of the employer being the person who pays the wages, the statute states in Section 5, Subsection 2, Subparagraph (3):

"It specifies the source or sources from which the funds necessary to make the payments required by subdivisions (1) and (2) of subsection 4 of this section are to be derived and contains reasonable assurance that such sources will be adequate for such purpose;"

In all references to the method of payment and withholding each shows without exception that the state, subdivision or instrumentality paying the employee is the employer. The act requires the comptroller, as the state agency, to be responsible for and to collect all of the payments made under the act. He does this directly from officers and employees of the state to whom he pays salaries and wages. This is done

Mr. Adolph Thym

from subdivisions by direct contact with the subdivision. Section 6, Paragraph 1, establishes a special Fund to be known as the Contributions and in Paragraph 5 of that section it is provided.

"The state comptroller at the end of each quarter shall certify to the state treasurer the amount of the state's share of the contributions required to be paid to the federal agency on account of the officers and employees of each department, division, agency, or unit of state government whose services are covered by an agreement entered into under section 2. Thereupon the state treasurer shall immediately transfer such amounts from the proper funds from which the officers and employees were paid to the credit of the contribution fund."

The probate judge and the employees of the probate court are not paid by the comptroller or out of the state treasury. They are paid from probate fees collected by their court. The jurisdiction of the court is limited to the boundaries of the City of St. Louis. His appointment is in accordance with the court plan and is for the boundaries of the City of St. Louis.

In regard to the court decision on whether or not the probate judge is a state officer we quote from State ex rel. Rucker v. Hoffman, 313 Mo. 667, at l.c. 672:

"Our conclusion is that, when a circuit judge in his official capacity is made a party to a suit in the circuit court and an appeal is taken in such case and no other constitutional grounds giving this court appellate jurisdiction under Article VI, Section 12, exist, such judge cannot be regarded as a state officer within the meaning of said section of the Constitution and appellate jurisdiction in such case is vested in the appropriate court of appeals.

"It is therefore ordered that this case be transferred to the Kansas City Court of Appeals.

"All concur, except Graves, J., who dissents, and Otto J., not sitting."

Mr. Adolph Thym

The above rule is again set out in Dietrich v. Brickey, Judge, et al., 37 S.W. (2d) 428, 1.c. 429, as follows:

"The only provision of the Constitution that would appear to invest us with jurisdiction (article 6, section 12) reads: 'In cases where * * * any State officer is a party.' However, we have construed the words 'state officer' as meaning such officers whose official duties are co-extensive with the boundaries of the state, excluding those officers whose functions are confined to counties and townships. State ex rel. v. Ingram, 317 Mo. 1141, 298 S.W. 37; State ex rel. v. Dillon, 90 Mo. 229, 2 S.W. 417; State ex rel. v. Spencer, 91 Mo. 206, 3 S.W. 410; State ex rel. v. Bus, 135 Mo. 325, 36 S.W. 636, 33 L.R.A. 616; State ex rel. v. Higgins, 144 Mo. 410, 46 S.W. 423; Dahnke-Walker Milling Co. v. Blake, 242 Mo. 23, 145 S.W. 438; Nickelson v. City of Hardin, 282 Mo. 198, 221 S.W. 358; State ex rel. v. Hoffman, 313 Mo. 667, 288 S.W. 16; State ex rel. v. Offutt (Mo. Sup.) 9 S.W. (2d) 595. By analogy and precedent it is evident that a county treasurer is not a state officer within the meaning of section 12 article 6, of the Constitution, so as to invest this court with jurisdiction by virtue thereof."

There is a conflict between the line of cases just cited and State ex rel. Buchanan County v. John F. Imel, 242 Mo. 293, at 1.c. 301, wherein Brown, J., stated as follows:

"Judges of the probate court are not charged with the performance of any governmental functions of the counties for which they are elected; in fact, some of them do not have jurisdiction co-extensive with the counties where their offices are held. Their functions are to administer the laws pertaining to estates of deceased persons, minors and persons of unsound mind.

"From the context of said section 12 of article 9, supra, it will be seen that

Mr. Adolph Thym

there is very little if any better reason for classifying probate judges as 'county officers' than for so designating judges of the circuit court when their circuits are composed of a single county.

"After a careful review of said section 12 of article 9 of the Constitution of Missouri, we are fully convinced that it was not intended to embrace or include judges of probate courts; and that in holding that it does embrace those officers, the case of Henderson v. Koenig, supra, is erroneous, and the same is therefore overruled."

It will be noted that these interpretations are in regard to different constitutional and statutory questions, and no definite rule has ever been established concerning whether or not a probate judge is a state or a county officer. It is, therefore, the opinion of this office that the position of a office must be considered in light of the interpretation of the constitutional or statutory question involved.

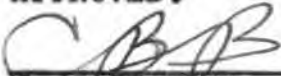
CONCLUSION

Therefore, it is the opinion of this department that the probate judge of the City of St. Louis and the employees of the probate court of the City of St. Louis are officers and employees of the City of St. Louis and may be incorporated in any agreement between the state agency under Senate Bill No. 3 and the City of St. Louis. Since the probate judge and the officers and employees of the probate court of St. Louis are not state employees, they are not at present covered under the provisions of S.C.S.S.B. No. 3.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

JWFab

CORONER: The Coroner of the City of St. Louis can succeed himself.
CITY OF
ST. LOUIS:



October 16, 1951

10-17-51

Honorable Patrick E. Taylor
Coroner, City of St. Louis
St. Louis, Missouri

Dear Sir:

We have your recent letter in which you request an opinion of this department, which letter reads as follows:

"Can the Coroner of the City of St. Louis
succeed himself under the new Constitution?"

The Constitution of Missouri in force prior to 1945, had a provision to the effect that a coroner should be eligible for only four years in any one period and thereby made it illegal for him to succeed himself. That constitutional provision was Section 10, Article IX of the Constitution, which existed prior to 1945, and reads as follows:

"There shall be elected by the qualified voters in each county on the first Tuesday next following the first Monday in November, A. D. 1908, and thereafter every four years, a sheriff and coroner. They shall serve for four years and until their successors be duly elected and qualified, unless sooner removed for malfeasance in office. Before entering on the duties of their office, they shall give security in the amount and in such manner as shall be prescribed by law, and shall be eligible only four years in any one period. Whenever a county shall be hereafter established, the governor shall appoint a sheriff and coroner therein, who shall continue in office until the next succeeding general election and until their successors shall be duly elected and qualified."

However, as you know, the Constitution of 1875 was completely superseded by the Constitution of 1945, which is now in effect, and the new Constitution does not contain a corresponding prohibition

Hon. Patrick E. Taylor

against the coroner succeeding himself in office. We have also thoroughly examined the existing statutes and find no provision which would prohibit the coroner from succeeding himself.


CONCLUSION

We are accordingly of the opinion that the coroner of the City of St. Louis can succeed himself under the new Constitution.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

SMW:mw

COUNTY COURT: The county court has no authority to approve or disapprove vouchers of the hospital board under
COUNTY HOSPITAL: Section 205.190, RSMo 1949; an assessor must give a surety company bond.



October 16, 1951

10-16-51

Mr. Francis Toohey, Jr.,
Assistant Prosecuting Attorney
Perry County
Perryville, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this department, which request reads as follows:

"We are having some difficulty determining what authority, if any, the County Court has in the matter of approving or disapproving the vouchers of the hospital board under Section 205.190, RSMo 1949.

"We would also like to know if the county court has the authority to transfer surplus money from the general revenue fund to the hospital operating fund.

"The auditors who are presently in Perry County have asked that I seek an opinion as to whether the Assessor must give a Security Co. bond. I told them that it was my interpretation that such was the case but they still felt that I should seek an opinion from you."

You first ask whether the county court has any authority under Section 205.190, RSMo 1949, to approve or disapprove vouchers submitted by the hospital board. Section 205.190, RSMo. 1949 reads in part as follows:

Mr. Francis Toohey, Jr.

"The board of hospital trustees shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the hospital as may be deemed expedient for the economic and equitable conduct thereof, not inconsistent with sections 205.160 to 205.340 and the ordinances of the city or town wherein such public hospital is located. They shall have the exclusive control of the expenditures of all moneys collected to the credit of the hospital fund, and of the purchase of site or sites, the purchase or construction of any hospital buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose; provided, that all moneys received for such hospital shall be deposited in the treasury of the county to the credit of the hospital fund, and paid out only upon warrants ordered drawn by the county court of said county upon the properly authenticated vouchers of the hospital board."

This section received interpretation in the case of State ex rel. Trimble, 316 Mo. 1041, wherein the Supreme Court of Missouri sustained the position taken by the Kansas City Court of Appeals (222 Mo. App. 531), that the only judgment to be exercised by the county court is to determine whether a voucher presented shows proper authentication by the hospital board, and whether the voucher is for a purpose within the control of the board. The court in its opinion stated:

"The Court of Appeals construed these statutes to mean that hospital trustees have exclusive control of the expenditure of moneys collected to the credit of the hospital fund. The natural interpretation of that language excludes the intervention of any other official in determining what claims are to be paid and what accounts ought to be allowed. The plain words mean that full discretion is vested in the hospital board to pass upon and determine the validity of every claim presented. Relators call attention to the provision that the money must be

Mr. Francis Toohey, Jr.

deposited in the treasury of the county and must be paid out only upon warrants drawn by the county court, and argue that the county court is thus vested with some discretion, some function to determine whether or not the claims presented are valid, but that same sentence of the statute goes on to say that such payments are made upon properly authenticated vouchers of the hospital board. That seems to leave no doubt that the only judgment exercised by the county court is determined whether the vouchers presented show proper authentication of the hospital board, and whether they are for purposes within control of the hospital board and for the purposes of the above statute. If such vouchers should show on their faces that they were issued for purposes foreign to the field controlled by the hospital board, the county court could deny warrants. * * *

In regard to the authority of the county court to make an appropriation from the general revenue fund for the improvement and maintenance of a county hospital, I am enclosing an opinion to Mr. Davis Benning, Prosecuting Attorney of Pike County, dated July 10, 1946. However, we are of the opinion that such an appropriation may only be made as provided by law and if such an appropriation as provided by Section 205.230 has already been made there could be no authority to transfer surplus money from the general revenue fund to the hospital operating fund.

You next inquire whether an assessor in a county of the fourth class must give a "Security" company bond. We assume you mean surety company rather than security. It is noted that prior to 1945 the law requiring an assessor to give bond was not couched in terms of a surety company bond. The present law is found in Section 53.040, RSMo 1949, which reads as follows:

"Every assessor (except the assessor of St. Louis city) before entering upon the duties of his office, shall give a surety company bond in a sum of not less than one thousand dollars, to be paid by the county or township, the amount to be fixed by the court or clerk, as the case may require, conditioned for the faithful performance of

Mr. Francis Toohey, Jr.

the duties of his office, which bond shall be deposited in the office of the clerk of the county court."

The terms of this section are clear and unambiguous. We are, therefore, of the opinion that an assessor must give a surety company bond.

CONCLUSION


Therefore, it is the opinion of this department that the county court has no authority to approve or disapprove vouchers of the hospital board under Section 205.190, RSMo 1949, and the only judgment to be exercised by the county court is to determine whether the vouchers presented show proper authentication and whether the voucher is for a purpose within the control of the board.

We are further of the opinion that an assessor in a county of the fourth class must give a surety bond.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

DDG:ba

SOCIAL SECURITY: The Kansas City Board of Election Commissioners, members of the Board of Election Commissioners, and its employees, for the purpose of Senate Bill No. 3, ^{of the Kansas Assembly} are covered by agreements entered into between the city of Kansas City and the state agency; the county of Jackson and the state agency; and county of Clay and the state agency, extending the benefits of Federal Old-Age and Survivors insurance to their employees.



October 19, 1951

Honorable William E. Tipton, Attorney
Board of Election Commissioners
Kansas City, Missouri

10/19/51

Dear Mr. Tipton:

Your request for an official opinion of this department reads as follows:

"The Board of Election Commissioners of Kansas City, Missouri, desire to come under the provisions of the recent Legislative enactment pertaining to Social Security.

"The Board has been advised by Mr. E. L. Pigg, State Comptroller, that there is considerable question as to who is to handle the contract for the Board of Election Commissioners, and, therefore, we should like an opinion from your office advising us of our status relative to the Social Security laws of Missouri.

"As you probably know, the Kansas City Board of Election Commissioners is a separate entity and we draw our funds from the City of Kansas City, Missouri, Jackson County and Clay County, but in reality we are the disbursing agent as far as the pay roll is concerned.

"We should like to come within the provisions of the Act before the end of September, and, therefore, we would like to have you advise us and also advise Mr. Pigg of our status."

Honorable William E. Tipton

You particularly request information in regard to the standing of your Board under the provisions of Senate Committee Substitute for Senate Bill No. 3. Assistant Attorney General Donal D. Guffey recently wrote an opinion which was published as the opinion of this department that the members of the Board of Election Commissioners and its employees for the purposes of Senate Bill No. 3 would be covered by an agreement entered into between the City of St. Louis and the state agency extending the benefits of the Federal Old Age and Survivors insurance to its employees.

Section 117.140, RSMo 1949, provides as follows:

"* * * The election commissioners shall each receive a salary of three thousand dollars per year, payable monthly. The members of the board designated as the chairman and the secretary, respectively, shall be paid an additional salary of six hundred dollars per year, payable monthly. The chief assistant employed by the board of election commissioners shall receive a salary of not to exceed three thousand three hundred dollars per year, payable monthly. Other assistants, not exceeding three in number, shall receive a salary of not to exceed two thousand nine hundred dollars per year, payable monthly. Other assistants, not exceeding ten in number, shall receive a salary of not to exceed two thousand six hundred dollars per year, payable monthly. All other additional assistants, if any, shall receive not to exceed seven dollars per day for the time actually employed. Compensation for overtime services necessarily and actually performed by any persons employed at the office of the board may be paid at the rate of such employee's regular pay. Precinct judges and clerks shall receive as pay seven dollars for each day or part of day while on duty, except pay shall be allowed only for those days mentioned in this chapter. All expenses incurred by said board of election commissioners and all costs and expenses of registration and election in such cities shall be paid one-half out of the city treasury and one-half out of the county treasury. * * *"

Honorable William E. Tipton

It is also provided in Section 117.150, RSMo 1949, as follows:

"When any such city shall be located in more than one county, all such salaries and expenses shall be paid one-half out of the city treasury and one-half out of the combined treasuries of all such counties with each county paying in proportion to the population of that part of each such city located in such county according to the last preceding federal decennial census. (1949 H.B. 2055 Sec. 117.145)."

The Board of Election Commissioners of Kansas City and its employees are not paid by the State of Missouri and there is no way the tax can be taken out as provided in Section 6, subsection 5 of Senate Bill No. 3. That subsection reads as follows:

"The state comptroller at the end of each quarter shall certify to the state treasurer the amount of the state's share of the contributions required to be paid to the federal agency on account of the officers and employees of each department, division, agency or unit of state government whose services are covered by an agreement entered into under section 2. Thereupon the state treasurer shall immediately transfer such amounts from the proper funds from which the officers and employees were paid to the credit of the contribution fund."

The above, however, would apply only in the event the Board and its employees were state officers and employees. In regard to whether or not the Election Board is a political subdivision, it is necessary to look to Section 1, subsection (7) of Senate Bill No. 3, which reads as follows:

"'Political subdivision', any county, township, municipal corporation, school district, or other governmental entity of equivalent rank;"

Honorable William E. Tipton

The Board of Election Commissioners is not one of those named. We cannot find that it is equivalent in rank with any of those as far as its governmental functions are concerned. The political subdivisions under Senate Bill No. 3 are politically defined above for the purposes of Senate Bill No. 3.

There is no doubt that the intention of the Legislature was to include Election Boards under the provisions of Senate Bill No. 3. As for instance, we quote from the bill, Section 1, subsection (2), in part:

"'Employee', elective or appointive officers and employees of the state, including members of the general assembly, and elective or appointive officers and employees of any political subdivision of the state, or any instrumentality of either the state or such political subdivision; * * *"

The Election Board, its members and employees consist of elected and appointed officers and employees of a political subdivision. They are not employees of the state under the terms of the State Social Security Act. It is our opinion, however, that the political subdivision employing them is the nearest subdivision of government from which they receive their pay.

In the matter of *Shamburger v. Commonwealth et al.* 240 S.W. (2d) 636, it has been ruled by the Kentucky Court of Appeals as follows, 1.c. 637:

"The fundamental point, it seems to us, is the fact that contributions (or excise taxes) required by the law to be paid by both employers and employees, is a percentage of wages or compensation paid and received. 26 U.S.C.A. secs. 1400, 1410. Therefore, so far as liability for payment is concerned, the controlling point is the source of the compensation, i.e., who pays the salaries." (Emphasis, ours.)

In this case, the nearest political subdivisions from which payment to the Board of Election Commissioners is made are defined in Sections 117.140 and 117.150, RSMo 1949. That would make the city of Kansas City, Missouri, and the counties of

Honorable William E. Tipton

Jackson and Clay responsible to the extent of the proportion of salary that each pay. Again under Section 5, subsection 1, we think there is justification for contracts to be made between these political subdivisions in regard to the method of including the election board. We quote in part from the above subsection, as follows:

"* * * Two or more political subdivisions or instrumentalities may form a joint plan if, in the absence of such joint plan, because of the requirements of the agreement entered into pursuant to section 2 of this act, or because of any requirement imposed by federal law, any subdivision included in such unit would be unable to submit an approvable plan."


CONCLUSION

It is, therefore, the opinion of this department that the Board of Election Commissioners of Kansas City and its employees are covered by agreements entered into between the city of Kansas City and the counties of Clay and Jackson, and the state agency extending the benefits of the Federal Old-Age and Survivors insurance to the employees of Kansas City and Jackson and Clay counties. In the event that all of the subdivisions mentioned are not covered by such agreement, then the Kansas City Board of Election Commissioners and its employees are covered in proportion to payments received from those political subdivisions that have come under and are covered by agreements.

Respectfully submitted,

JAMES W. FARIS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

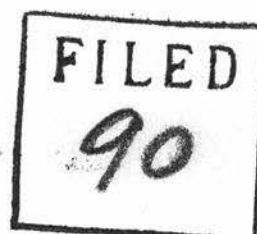
JWFab

STATE MERIT SYSTEM ACT:

The State Merit System Act prohibits a person employed under this act from becoming a candidate for election to the office of member of a local school board.

May 1, 1951

5-4-51



Mr. Ralph J. Turner, Director
State Department of Business and
Administration
630 Jefferson Street
Jefferson City, Missouri

Dear Sir:

You have requested an opinion from this department which request reads as follows:

"A part of Section 36.150(5), Missouri Revised Statutes, 1949, regarding election to any public office, reads as follows:

"'. . .No such employee shall be a candidate for nomination or election to any public office except he resign or obtain a regularly granted leave of absence from such position. . . .'

"We respectfully request an opinion as to whether or not an individual employed under the State Merit System can be a candidate for nomination or election to the office of Member of a Local School Board."

Section 36.150, paragraph 5, RSMo 1949, to which you have made reference and which is the basis of the above stated question more fully provides:

"No employee selected under the provisions of this law shall be a member of any national, state, or local committee of a political party,

Mr. Ralph J. Turner

or an officer of a partisan political club. He shall take no part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen to express his opinion and to cast his vote. No such employee shall be a candidate for nomination or election to any public office except he resign, or obtain a regularly granted leave of absence, from such position."

The first question presented and which must be answered is whether or not a school board member is a public officer. Although we have been unable to find any reported Missouri case in which the court has in clear and concise terms stated that a school board member is a public officer, we have sufficient reason to believe that the courts have always considered him as such.

In the case of State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, the court was called upon to decide whether a person could be at the same time deputy sheriff and school board director. In holding that this could be done the court based their decision upon the proposition that at common law a person could occupy more than one public office at the same time if they were not incompatible, and upon a constitutional provision prohibiting a person from holding two public offices. To verify this conclusion we quote from the opinion of the court.

"Where the holding of two offices by the same person, at the same time, if forbidden by the constitution or a statute, the effect is the same as in case of holding incompatible offices at common law. * * *"

It is noted that in this case the court was called upon to decide whether a deputy sheriff is in fact a public officer but no question was raised as to whether a school director is a public officer. By failure to specifically state that a school director was not a public officer and by basing their opinion on the above stated grounds the court impliedly held that a school director is a public officer, for if this is not true, then there is no basis for the opinion. To further strengthen our conclusion that the court deemed a school director a public officer, we find the court in conclusion saying:

"The two offices then being neither repugnant to the constitutional or statutory prohibitions, nor incompatible, they may properly be held by one person. Judgment of ouster is denied. * * *"

(Underscoring ours.)

Mr. Ralph J. Turner

The Supreme Court of Missouri has consistently adhered to the view that quo warranto is the proper remedy to oust a school board member. Quo warranto being defined in 44 Am. Jur., page 100, as follows:

"Quo warranto is generally regarded as an appropriate and adequate remedy to determine the right of title to a public office * * *."

In the case of State v. Ellis, 329 Mo. 124, 44 S. W. (2d) 129, a suit in the nature of quo warrant was brought to oust a school director. On appeal the question of jurisdiction was raised and in its opinion the court said:

"The office of school director is an office under this state and hence the appeal should have been to the Supreme Court. * * *"

Section 11, Article VII, of the Constitution of Missouri 1945, provides that a person shall take a prescribed oath before entering into the duties of a public office. Section 165.320 RSMo 1949, sets forth the qualifications of a school board member for a city, town or consolidated school district and has prescribed an oath pursuant to the constitutional provisions above referred to.

"Within four days after the annual meeting, the board shall meet, the newly elected members, who shall be qualified by the taking of the oath of office prescribed by article VII, section 11, of the constitution of Missouri, * * *"

There are similar provisions for members of a school board for a common school district and a district in the City of St. Louis thereby covering all possible board members. See Sections 165.210 and 165.567, RSMo 1949.

Although the above cited authority is not deemed to be exhaustive of the source, we believe that it is adequate to support our conclusion that a school board member is an individual invested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public and is therefore a public officer within the general accepted meaning of the term.

Having reached the conclusion that a school board member is a public officer, we must refer to Section 36.150, RSMo 1949, to see if such an officer falls within its terms. We note that there are no specific exceptions to the operation of the statute and in fact, the language of the statute is quite general. Since section 36.150 by its express terms is made applicable to the nomination or election to any public office, we believe that a school board member being a

Mr. Ralph J. Turner

public officer is subject to the provisions thereof.

CONCLUSION

Therefore it is the opinion of this department that the State Merit System Act prohibits employees under this Act from becoming a candidate for election to the office of member of a local school board except that he resign or obtain a regularly granted leave of absence from such position.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DDG:hr

TOWNSHIP FUNDS: Township Board has authority to use Township funds in payment of damages for condemned right of way to be used for road construction being done under provisions of the King Road Bill (Sections 231.440 to 231.500, RSMo 1949.)

May 16, 1951

5-16-51 FILED

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Honorable Ernest Troutman
Prosecuting Attorney
Carrollton, Missouri

Dear Sir:

I have before me your request for an opinion of this department. Also your letter of March 1, 1951, containing additional facts the same having been requested of you by this office. The pertinent part of the March 1st letter is as follows:

"The situation as presented to me is this:

"A Township road, then maintained by the Township was designated as a road to be widened and otherwise improved under the provisions of the so called King-Thompson Bill. (Sections 231.440 to 231.500 R. S. Mo. 1949.) Representatives of the State Highway Commission procured right of way from some of the landowners but not all. Thereupon a condemnation suit was instituted in Carroll County by the State of Missouri, in relation of the State Highway Commission. The petition was approved and Commissioners appointed. The Commissioners made a report awarding damages in the aggregate approximating \$1500.00. The Highway Commission filed exceptions to the report. These exceptions have not yet been heard.

"The Highway Commission advised the County Court and the Township Board that the State would pay none of the damages. Thereupon the County Court paid a portion of the award into the office of the Circuit Clerk and the Township Board issued a warrant by which it paid approximately one-third of the damages. This sum was also deposited with the Clerk. It was designated as payment for right of way.

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"Title to the condemned land was taken in the name of the State.

"My inquiry was whether or not the Township Board had authority to use Township funds for the acquisition of such right of way, when it was not a party to the suit nor acquired any title to the lands condemned."

We believe the situation, as explained by you, in the portion of your letter above set out is covered by Section 231.460, RSMo 1949, it being one of the sections of the statutes comprising the King Road Bill (Sections 231.440 to 231.500, inclusive, RSMo 1949) which you erroneously refer to as the King-Thompson Bill.

Section 231.460, supra, reads as follows:

"1. The county roads to be improved, constructed, reconstructed, or restored under the provisions of sections 231.440 to 231.500 shall be selected by the respective county courts of the counties wherein said roads are located. The county courts in counties having special road districts or counties under township organization, when authorized by any such special road district or county township organization, may represent and cooperate with, enter into contracts with, or for, and receive funds, plans and proposals from or for such special road districts and townships, for the purpose of carrying out the provisions of sections 231.440 to 231.500. Each county court shall select such roads in the following order:

"(1) County roads which are used for all of the following purposes: School bus routes, mail routes, milk routes.

"(2) County roads which are used for any two of the following purposes: School bus routes, mail routes, milk routes.

"(3) County roads which are now used for any one of the following purposes: School bus routes, mail routes, milk routes.

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"(4) County roads which may be used, if improved or restored, for any one or more of the following purposes: School bus routes, mail routes, milk routes.

"(5) Any other county road, provided consideration shall be given to the number of farms served by said road and the amount of traffic on said road.

"2. In the selection of such roads on the above basis and in the above order, the county court shall give consideration, first, to all-weather county roads which have deteriorated and are in need of restoration or reconstruction, second, to dirt or non-all-weather county roads, and third, to any other county roads.

"3. 'County roads' as used in sections 231.440 to 231.500 means all public roads located within any county, except roads or highways constructed or maintained as state roads or highways, and except roads, streets or highways in incorporated villages, towns or cities."

(Underscoring ours.)

The underscored portion of the statute as set out above undoubtedly gives townships the authority, when acting in accordance with the terms of the statute, through their respective county courts, the right to receive and disburse monies in securing county aid road funds (King Road Bill Funds).

Acting under the township board's authorization, as here given, the county court can do all things necessary to carry out the provisions of the King Road Bill, supra, with regard to obtaining county aid road funds and doing all other things necessary, such as here the condemnation of certain real estate to enable the widening and improvement of the road here in question.

The fact that the county court acting through the State Highway Commission condemned the right of way in the name of the State is of no moment here, as in the last instance the condemnation of all land condemned for public purposes by any political subdivision, can only be exercised by it because of

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the State's relinquishment of that part or parts of its right of eminent domain to its various parts by express statute.

[The State ex rel. J. Henry Caruthers, Appellant, v. Little River Drainage District, et al., 271 Mo. 429, l.c. 435, 196 S.W. 1115.]

CONCLUSION

It is, therefore, the opinion of this department that the Township Board had authority to use Township funds to acquire this right of way, although it was not made a party by name to the condemnation suit nor did it acquire title to the lands condemned.

Respectfully submitted,

A. BERTRAM ELAM
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

ABE:ba

RECORDER OF DEEDS:
LEASE:

Lease is instrument in writing affecting real estate as set out in Section 59.360 RSMo 1949. Recorder of Deeds not authorized to permit either party to a lease to alter the same after it has been delivered to the recorder for recording.

Hon. Ernest Troutman,
Prosecuting Attorney
Carroll County,
Carrollton, Missouri.

July 27, 1951.



Dear Sir:

This will acknowledge receipt of your recent request for an official opinion on questions which you present as follows:

"A number of oil and gas leases signed and acknowledged by the lessors (only) were filed for record in the office of the Recorder of Deeds of Carroll County. Some of the leases were acknowledged more than twelve months prior to the recording date, and were held by the Recorder as per Section 59.360 R. S. Mo. 1949. The lessee now desires to have the leases signed and acknowledged on behalf of the lessee.

"The questions involved are:

"Do these instruments properly come under 'instruments of writing affecting real estate, as set out in Section 59.360 R. S. Mo. 1949'?

"If so, does the recorder have any authority to permit the lessee to sign and acknowledge such instruments after being recorded.

"If so, and the leases acknowledged less than 12 months prior to the recording date, is the proper procedure to have the entire lease re-recorded or record only the additional acknowledgment?"

Your questions will be discussed in the order presented by you.

1. Do these instruments properly come under "instruments of writing affecting real estate, as set out in Section 59.360 RSMo. 1949?"

Section 59.330, RSMo 1949, enumerates in part the instruments which it shall be the duty of the recorder to record in the following words:

Hon. Ernest Troutman,

"It shall be the duty of recorders to record:

"(1) All deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices;"

Section 59.360 provides that instruments in writing affecting real estate, which purport to have been signed and acknowledged more than twelve months prior to the time the same shall have been presented for record, shall be retained in the recorder's office, subject to the inspection of all parties interested, for one year next succeeding the time such instrument shall be recorded, in the following words:

"Whenever the recorder of deeds, or any other person acting as recorder of deeds, in any county in this state, shall record any instrument of writing affecting real estate, which purports to have been signed and acknowledged more than twelve months prior to the time the same is presented for record, he shall retain such instrument of writing in his office, subject to the inspection of all parties interested, for one year next succeeding the time such instrument shall be recorded:* * *".

A written lease properly is an instrument affecting real estate which the recorder is authorized to record and as such "writing affecting real estate" should be retained by the recorder, subject to the inspection of all parties interested, for one year next succeeding the time of recording.

In the case of Faxon v. Ridge, 87 Mo. App. 299, the court held that a leasehold interest is a chattel real, and at l.c. 308, mentioned the recording of leases in the following words:

"It (the statute) reads as follows: 'Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved and acknowledged and certified in the manner hereinbefore prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated.' RSMo 1899, sec. 923. The lease paper, though a chattel, was certainly an instrument which 'affected' real estate in the sense of that statute. It was therefore necessary to the protection of the lessor, that it be recorded in the real estate records* * *."

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It is the opinion of this office that a written lease should be regarded as an "instrument in writing affecting real estate" and should be disposed of as directed by Section 59.360, RSMo 1949, by the recorder of deeds if such instrument purports to have been signed and acknowledged more than twelve months prior to the time the same is presented for record.

2. "Does the Recorder have any authority to permit the lessee to sign and acknowledge such instruments after being recorded?"

The Recorder is not authorized to alter or allow anyone else to alter an instrument presented to him for recording. The recorder is charged by section 59.400, RSMo 1949, with recording the instrument presented to him "word for word" as it appears at the time it is delivered to the recorder. Said section reads as follows:

"The recorder shall record, without delay, every deed, mortgage, conveyance, deed of trust, bond, commission or other writing delivered to him for record, with the acknowledgment, proofs and certificates written on or under the same, with the plats, surveys, schedules and other papers therein referred to, and thereto annexed, in the order of time when the same shall have been delivered for record, by writing them word for word, in a fair hand, noting, at the foot of such record, all interlineations and erasures and words visibly written on erasures, and noting, at the foot of the record, the day and time of the day, month and year, when the instrument so recorded was delivered to him, or brought to his office for record; and the same shall be considered as recorded from the time it was so delivered."

Under the above section the recorder of deeds must record all instruments delivered to him for record, word for word, and the instrument shall be recorded, and considered as recorded, from the time it was delivered to him for record. There is no provision which would allow the recorder to change the original instrument or permit it to be changed as delivered, or change the reading of the instrument after the writing of the instrument into the record word for word. Neither is the recorder authorized to alter his record to comport to changes made in an instrument after it has been delivered for recording. It appears that in the instance here, the recorder who must keep the lease on file in his office for one year, open to the inspection of parties interested therein, would not be authorized to allow it to be altered in any way. Since the duty is obligatory on the recorder to retain the instrument in question for one

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year, the recorder is not authorized to deliver it to any party until the expiration of that period for alteration or for any other purpose than for inspection.

3. "If so, and on the leases acknowledged less than 12 months prior to the recording date, is the proper procedure to have the entire lease re-recorded or record only the additional acknowledgment?"

The parties, of course, may enter into a new lease affecting the same real property for the purpose of having the execution of the same corrected and present such new instrument for recording, and the recorder would then record the new lease "word for word" as delivered. The recorder would not be authorized to record only the alterations or to change his record to conform to any alterations made in the original record.

We do not herein pass upon the validity of a lease not signed and acknowledged by the lessee since the recorder need not pass on that question as a prerequisite for recording the same.

CONCLUSION.

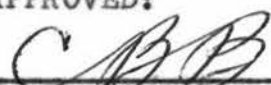
A lease is an "instrument of writing affecting real estate as set out in section 59.360, RSMo 1949.

The recorder of deeds is not authorized to permit instruments delivered to him for recording to be altered by either party to the instrument.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney-General.

JEM/ld

MERIT SYSTEM:) 1. Notice of dismissal must be dated at least prior
) to the effective date of the dismissal.
NOTICE:) 2. Reason for dismissal must be sufficiently explicit
) that employee is able to explain and defend charges.

October 25, 1951

11-2-51

Honorable Ralph J. Turner
Director, Personnel Division
Department of Business and Administration
630 Jefferson Street
Jefferson City, Missouri



Dear Sir:

This is in reply to your request for an opinion,
which is as follows:

"On Thursday, October 18, 1951, the Personnel Advisory Board heard an appeal of an employee from a dismissal. A part of Section 36.380, Missouri Revised Statutes, 1949, regarding dismissal of an employee, reads as follows:

"An appointing authority may dismiss for cause any employee in his division occupying a position subject hereto when he considers that the good of the service will be served thereby. No dismissal of a regular employee shall take effect unless, prior to the effective date thereof, the appointing authority gives to such employee a written statement setting forth in substance the reason therefor and files a copy of such statement with the Director"

"In the particular case that the Personnel Advisory Board heard, the following letter of dismissal was written to the employee:

Honorable Ralph J. Turner

"You are advised that because of conduct which is detrimental to the interests of the institution, your services as Cook II at the St. Louis State Hospital will be terminated effective after duty hours, August 31, 1951."

"The questions that the Board wishes resolved are:

"1. What is prior notice? In other words, a letter dated August 31, 1951, was written to the employee terminating her services effective after duty hours August 31, 1951. This notice was received by the employee September 1, 1951.

"2. The other question to be resolved is whether or not the above letter meets the requirement of the law which states that the appointing authority shall give to such an employee a written statement setting forth in substance the reason therefor."

Section 36.380, RSMo 1949, contains positive language as to the procedure to be followed by an appointing authority when dismissing an employee from the classified service. It states unequivocally that "No dismissal of a regular employee shall take effect unless, prior to the effective date thereof, the appointing authority gives to such employee a written statement setting forth in substance the reason therefor and files a copy of such statement with the director."

In the case now before us we have the situation where a letter was given to an employee dismissing the said employee from the classified service effective the same date as the notice. This letter was transmitted through the mails to the employee and was not received until the day following the effective date of the dismissal.

The word "date" means the same in its legal as in its ordinary sense and imports the day of the month, the month,

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and the year; the day of the month being as essential a part of the date as the month or the year. (Heffner v. Heffner, 20 S. 281, 48 La. (Ann.) 1088.)

The word "effective" in its ordinary and usual meaning is construed as denoting the production of an effect or result whose continuance in the future it suggests. (Rowan v. New York Ins. Co., 124 S.W. (2d) 577, 580.) Therefore, in relation to the present matter the term, effective date, would mean the date when the dismissal takes place and the date from which the dismissal is to continue.

The Legislature has seen fit to set up the requirement that before a discharge can take place the employee must receive a written statement prior to the effective date of the dismissal.

The word "prior" is defined in Webster's New International Dictionary (2nd Ed.) as, "preceding in the order of time; earlier and therefore taking precedence; previous; * * * also, with to, antecedent in time, * * *; anterior * * *."

Therefore, it seems inescapable that a notice of dismissal to take effect on August 31st must have been given at least on an earlier date than the date of August 31st.

We believe this view is further strengthened by the fact that "statutes regulating the general subject of notice are always to be construed, with respect to the time or period of notice, most liberally in favor of the party who is to be effected by the notice." (66 C.J.S., page 658.) From the above analysis we do not believe that the notice to the employee of her discharge was given prior to the effective date thereof, and therefore, in law, the dismissal has not taken effect.

In answer to your second question we note that the employee was notified of her dismissal "because of conduct which is detrimental to the interests of the institution." Section 36.380, RSMo 1949, provides that an appointing authority may dismiss for cause any employee in his division when he considers that the good of the service will be served thereby. However, the appointing authority must give to such employee "a written statement setting forth in substance the reason for the dismissal." The question for our determination is whether or not the reason as given in the notice sets forth "in substance" the reason for the dismissal.

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The word "substance" has been defined as the essence; the material or substantial part of a thing as distinguished from "form." (State v. Burgdoerfer, 107 Mo. 1.) Therefore, as used in this statute, the statement must contain the essential reason or real reason for the dismissal.

In seeking the rule to be followed in determining what is a sufficient notice of dismissal, we note that the Supreme Court of Massachusetts considered the use of the terms, "cause" and "reason" when used in statutes concerning civil service. In the case of McKenna v. White, 192 N.E. 84, the court analyzed the two words as follows:

"There is requirement that the authorized officer or board in removing an incumbent from office or employment in the public service under some statutes shall state the cause, in others the reason or reasons, and in still others both the cause and the reason or reasons. In Ayers v. Hatch, 175 Mass. 489, 56 N. E. 612, the statute permitted removal of an officer by the mayor 'for such cause as he shall deem sufficient and shall assign in his order of removal.' (Page 491 of 175 Mass., 56 N. E. 612, 613.) It was held that an order of removal 'for the good of the service' was sufficient under the statute. It was said at page 492 of 175 Mass., 56 N. E. 612, 613, 'Cause implies * * * a reasonable ground of removal, and not a frivolous or wholly unsatisfactory or incompetent ground of removal. If the cause assigned is a reasonable one, then, whether, under the circumstances, it is sufficient to justify a removal, is for the mayor to decide, and his decision is final.' O'Dowd v. Boston, 149 Mass. 443, 21 N. E. 949; Bailen v. Assessors of Chelsea, 241 Mass. 411, 135 N. E. 877, and cases cited. In Stiles v. Municipal Council of Lowell, 229 Mass. 208, 118 N. E. 347, the statute required that there be no removal from office 'except for just

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cause and for reasons specifically given in writing.' It was held that a statement of proposed and of final removal 'for the good of the service' was ineffectual because not in conformity to the statute. The Legislature has made a distinction between 'cause' and 'reasons' in connection with removals from office or employment protected by the laws relating to the civil service where both words are used. * * *

"The two words are often used in a similar sense. There is a difference in meaning between them in application to removal from office or employment. Cause occasions the removal. It is a succinct statement of that which produces or leads to removal as the result. Reason or reasons are the circumstances, the proofs, the facts or the motives, which generate the conviction that there ought to be removal. A statement of the reason or reasons for removal is a full and fair answer to the question why was the removal made. The statement of a cause may be in general terms. A statement of the reason or reasons must be somewhat definite and detailed. Underwood v. Board of County School Commissioners, 103 Md. 181, 63 A. 221. The good of the service is a sufficient statement of a cause for removal. It is not an adequate statement of the grounds which create the state of mind precedent to the establishment of that cause in the opinion of the removing person or board. A statement of the reason or reasons leading to the removal of another from office explores the mind and searches the conscience more deeply than the statement of the cause. The manifest purpose of the provision that a removal from an appointive office

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be accompanied by written statement of the reason or reasons therefor signed by the removing officer or officers to be filed with the public records of the city is to impose the restraint upon unwarranted, prejudiced or wrongful removals naturally flowing from immediate, complete and permanent publicity of the true grounds and motives underlying that action, and to enable the removed officer or employee to know why he has been deemed unworthy to continue longer in the public service. This is by no means a vain form. Its design is to improve the public service and to afford some sense of security to faithful, efficient and honest officers and employees of good morals and sound character working with fidelity for the general welfare, and at the same time to confer upon responsible executive officers power to remove the incompetent, the inefficient and the unworthy."

In the McKenna case, the notice of removal was "for the good of the service," and this was held insufficient. We think that the terminology used in the instant notice, "because of conduct which is detrimental to the interests of the institution," is sufficiently similar that the principle of the McKenna case is applicable. The notice has stated the cause of removal but has not stated "in substance" the reason therefor.

In another case concerning a civil service statute the Court of Appeals of Ohio had the following to say concerning the sufficiency of a notice in *State v. Bahr*, 40 N.E. (2d) 677, 680:

"The order of removal must not be so indefinite in its terms that its purpose and effect could not be determined. It must be sufficiently definite as to advise the employee of the charge against her in terms sufficiently explicit as to enable her to make an explanation

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if she so desires. State ex rel. Bay v. Witter, Dir., 110 Ohio St. 216, 223, 143 N.E. 556; State ex rel. Desprez v. Board of County Com'rs, 47 Ohio App. 1, 189 N.E. 665, 667.

"But the order of removal need go no further than to set forth the reasons in such understandable language as would convey to the one removed the facts comprising the reason for removal.

"The statement of the reasons need not be as specific or particular as an indictment, nor drawn with the formal exactness of pleadings in a court of justice.' State ex rel. Desprez v. Board of County Com'rs, supra."

Therefore, it would seem that a notice must be sufficiently definite so as to advise an employee in the classified service of the charge against the employee in order to enable him to make an explanation. As stated in the above case this notice is not required to be as specific or particular as an indictment, but it still should contain such understandable language as would convey to the removed employee the facts comprising the reason for removal.

We think that our opinion in this matter is strengthened by the language used in Section 36.370, RSMo 1949, providing for suspension of employees. That section states in part, "In case of a suspension, the director shall be furnished with a statement in writing specifically setting forth the reasons for such suspension." Upon request, a copy of this statement shall be furnished to the employee. It would seem unreasonable to impute a legislative intent to require a statement specifically setting forth the reasons for a suspension and in the more drastic case of a dismissal merely provide for a general statement of the reasons.

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CONCLUSION

Therefore, it is the opinion of this department that:

(1) Where the State Merit System Act requires a notice to be given to an employee prior to the effective date of a dismissal, a notice given on the same date as the effective date of dismissal is invalid, and the dismissal is of no effect; and

(2) Such a notice of dismissal must be sufficiently definite and explicit as to the reasons for dismissal so that the employee involved may ascertain the facts comprising the reason for dismissal and be enabled to make an explanation thereof, and, in effect, defend the charges.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JRB/fh

LEGISLATORS:

ASSISTANT PROSECUTING ATTORNEY:

Member. General Assembly may not be appointed Assistants Prosecuting Attorney in counties of the fourth class in this State during the term for which they are elected to the General Assembly.

February 14, 1951

3-27-51

Honorable Curt M. Vogel
Prosecuting Attorney
Perry County
Perryville, Missouri



Dear Mr. Vogel:

This will be the opinion which you recently requested from this Department asking if a member of the State Legislature may be appointed Assistant Prosecuting Attorney of a county of the fourth class under Section 56.240, RSMo 1949, (Laws of Missouri, 1945, Section 4, (R.S. Mo. 1939, Section 12939.9)), and retain his position as State Representative. Your letter states:

"At the present time I am Prosecuting Attorney of Perry County, Missouri a county of the 4th class, having been elected for a term of two years for the years 1951 and 1952. I am also a reserve officer in the Air Force Reserve, and having reason to believe that I will be called to active duty within a short time.

"We have three other attorneys in the county, of whom two are engaged in active practice. Of these two, one is a State Senator and also a reserve officer, the other is the County Representative at Jefferson City. This latter attorney is the only one who would be eligible to serve at this time in the event I am called. My question therefore is,

"Can a State Representative be appointed assistant Prosecuting Attorney of a county

Honorable Curt M. Vogel

of the 4th class under R.S. Mo. 1939, Laws of 1945, Section 12939.9 and retain his position as a State Representative.

"A reply to this would be appreciated within a reasonably short time, and if further information concerning this question is desired please call me collect at any time. Your attention in this matter will be appreciated."

Section 56.240, RSMo 1949, reads as follows:

"The prosecuting attorney in counties of the third and fourth classes may appoint one assistant prosecuting attorney who shall possess all the qualifications of a prosecuting attorney and be subject to all the liabilities and penalties for failure or neglect to discharge his duty to which prosecuting attorneys are now or may hereafter be liable. * * * ."

Section 12, Article III of the present Constitution of this State, disqualifying members of the General Assembly of this State from holding any office or employment under the United States, this State or any municipality thereof, reads as follows:

"No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. During the term for which he was elected no senator or

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representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. This section shall not apply to members of the organized militia, of the reserve corps and of school boards, and notaries public."

Respecting the holding by one person of two offices, 46 C.J. 941, 942, states the common law rule on the subject as follows:

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. * * *."

We believe, under the provisions of Section 56.240, supra, prescribing the qualifications and responsibilities of an Assistant Prosecuting Attorney in counties of the fourth class in this State, that such office of Assistant Prosecuting Attorney would be an office under this State. The Supreme Court of this State in the case of State ex rel. Walker, Attorney General vs. Bus, 135 Mo. 325, gives its approval to the common law rule prohibiting the holding of two offices which are incompatible, because against public policy, and also holds that where the holding of two offices by the same person at the same time is forbidden by the Constitution or a statute, such holding is illegal as in the case of holding incompatible offices at common law, pointing out that where such illegality is declared by positive law, incompatibility in fact is not essential to prohibit such holding. The Court, so holding, 1.c. 330, said:

"The rule at common law is well settled that one who, while occupying a public office, accepts another which is incompatible with it, the first will, ipso facto, terminate without judicial

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proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first. State ex rel. v. Lusk, 48 Mo. 242; Mechem, Pub. Offices, secs. 420-426; Throop, Pub. Officers, secs. 30, 51.

"The rule, it is said, is founded upon the plainest principles of public policy, and has obtained from very early times. King v. Patteson, 4 B. & Ad. 9.

"The rule has been generally stated in broad and unqualified terms, that the acceptance of the incompatible office, by whomsoever the appointment or election might be made, absolutely determined the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed, neither quo warranto nor a motion being necessary." 1 Dill. Mun. Corp. (4 Ed.) sec. 225; People ex rel. v. Brooklyn, 77 N.Y. 503.

"Where the holding of two offices by the same person, at the same time, is forbidden by the constitution or a statute, the effect is the same as in case of holding incompatible offices at common law. In such case, the illegality of holding the two offices is declared by positive law, and incompatibility in fact is not essential. In each case the holding of two offices is illegal; it is made so in one case by the policy of the law, and in the other by absolute law. ***."

The Court was considering, in the Bus case, supra, the question of whether the offices of deputy sheriff of the City of St. Louis and a member of the school board of said city could, under the Constitution, be held at the same time by one person. The Court immediately was construing Sections 10, 12 and 14 of Article 9 of the 1875

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Constitution of this State to determine the question whether the deputy sheriff was a "state" officer or a "county" officer, and, also, if a "county" officer, the further question of his right to hold the office of school director to which place he had previously been elected. The Court held in that case, under the particular language in said sections of said Article 9, that the deputy sheriff was not an officer "under this state", but was a "county" officer, and, as such, was not prohibited from holding the additional office of school director in the city.

In its construction of the constitutional provisions of Article 9, and in arriving at the Court's conclusion pointing out the distinction between "county" offices and offices "under this state", the Court also quoted and gave its definition and construction of the phrase "officers under the state", as contained in Section 12 of Article 4 of the 1875 Constitution and made clear the difference between the provisions of Section 12 of Article 4 and the provisions of Sections 10, 12 and 14 of Article 9, in their respective uses of the phrase "officers under the state" where, l.c. 334 and 335, the Court, holding that officers of a county, under Section 12 of Article 4, though not named, would be included under the expression "officers under the state", said:

"Section 12, article 4, of the constitution provides: 'No senator or representative shall, during the term for which he shall have been elected, be appointed to any office under this state, or any municipality thereof; and no member of congress or person holding any lucrative office under the United States, or this state, or any municipality thereof (militia officers, justices of the peace, and notaries public excepted) shall be eligible to either house of the general assembly, or remain a member thereof, after having accepted any such office or seat in either house of congress.'

"Under this section all officers (except those under the United States)

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are divided into two classes, viz.;
'officers under the state' and officers
'under a municipality thereof.'
The language 'officers under the state'
would include justices of the peace,
or they would not have been excepted.
Officers of a county, though not named,
would be included under the expression
'officers under the state.'

The Court held, construing the language in Sections 10, 12 and 14 of Article 9 of the Constitution of 1875, that the office of deputy sheriff of the City of St. Louis was a "county" office, but, nevertheless, it was not an office "under this state", and that the acceptance thereof by the deputy sheriff did not prevent him from retaining the office of school director. Whereas, the Court held in its construction of the provisions of Section 12 of Article 4 of the 1875 Constitution that county offices are offices "under this state".

It will be observed that Section 12 of Article 4 of the Constitution of 1875 is now, with no change in substance or effect, Section 12 of Article III, supra, of our present Constitution. The construction of Section 12 of Article IV of the former Constitution given by the Court in the Bus case, in saying that county officers, though not named, were, by such terms of said Section 12 officers under the State, as applied to the terms of Section 12 of Article III of our present Constitution, must likewise be held to mean that county officers, though not named, are officers "under the state".

Section 56.240, supra, provides that the Assistant Prosecuting Attorney in counties of the fourth class, when appointed by the Prosecuting Attorney shall possess all of the qualifications of a Prosecuting Attorney, take and subscribe to the oath or affirmation of office required by the Prosecuting Attorney, and discharge all the duties imposed upon the Prosecuting Attorney by law, and possess all of the responsibilities of the Prosecuting Attorney.

Sections 56.060, 56.070, 56.080, 56.090 and 56.100, RSMo 1949, respectively, prescribe the duties of the Prosecuting Attorney and his assistant, when appointed. These

Honorable Curt M. Vogel

duties and the mandatory direction by the statutes for them to perform such duties constitute express authority by law for the Prosecuting Attorney and his assistant to perform and they do perform thereby functions of sovereign government for the benefit of the public.

The power to appoint an Assistant Prosecuting Attorney in counties of the fourth class has been delegated by the Legislature to the Prosecuting Attorney. The appointment and the oath taken by the assistant must be filed in the office of the Circuit Clerk of the County. This becomes the formal record evidence of his appointment and induction into the office. It constitutes his "commission" to perform the duties of the public office of Assistant Prosecuting Attorney as and when required of him by law. He thereby becomes a public officer. With respect to the status of an "assistant" to a public officer 67 C.J.S. 449, gives the following definition:

"The term 'assistant', when used with respect to an assistant to a public officer, has been held to refer to one who helps a public officer in the performance of the latter's duties, that is, one who stands by and helps or aids an officer. * * * ."

The question of the authority as an officer of an Assistant Prosecuting Attorney, upon his appointment by the Prosecuting Attorney, was before the Supreme Court of this State in the case of State vs. Carey, 1 S.W. (2d) 143. The defendant was charged with a felony. The defendant questioned the right of the Assistant Prosecuting Attorney to file the information under which he was charged with the offense. Holding that when the occasion arises an Assistant Prosecuting Attorney may perform any duty of the office, and in affirming the conviction, the Court, 1.c. 145, said:

"The legality of the act of the assistant prosecuting attorney in filing the information is challenged, and, as a consequence, the validity of the information. It is conceded by the appellant that the assistant was appointed under the authority of sections 751, 752, and 753, R.S. 1919.

Honorable Curt M. Vogel

"Section 751 confers the power of appointment of an assistant upon the prosecuting attorney, defines the qualifications of the appointee, and declares his official liability to be those of the prosecuting attorney.

"Section 752 prescribes how the appointment shall be made and the manner in which the appointment shall qualify for the discharge of his duties.

"Section 753, so far as the same relates to the matter at issue, provides that the assistant shall perform the duties of the prosecuting attorney (1) when the latter is sick, (2) absent from the county, or (3) engaged in the discharge of the duties of his office and cannot attend.

"When, therefore, either condition defined in the statutes arises, an assistant prosecuting attorney may perform any act within the range of the duties of that office. This conclusion is in harmony with a well-established rule in construing statutes defining the powers of public officers, that:

"Where a public officer is authorized to appoint a deputy, the authority of that deputy, unless otherwise limited, is commensurate with that of the officer himself, and, in the absence of any showing to the contrary, it will be so presumed. Such a deputy is himself a public officer, known and recognized as such by law. Any act, therefore, which the officer himself might do, his general deputy may do also." Mechem's Offices and Officers, Sec. 571."

Discussing the question of the status of a public officer being established by the exercise of some portion of the sovereign functions of government, the Kansas City

Honorable Curt M. Vogel

Court of Appeals, 91 Mo. App. Rep. 438, considered the case of State ex rel. vs. Gray. The question at issue was whether the engineer for the city hall was an officer or merely an employee. Holding that such person was an officer because of the duties, including governmental functions, which were imposed upon him, the Court, l.c. 443, said the following:

"* * * Definitions of a public office, or a public officer, are numerous and are all necessarily couched in general language. Mechem on Public Offices and Officers, section I, states the following, which has also been stated by our Supreme Court (State ex rel. v. Valle, 41 Mo. 29; State ex rel. v. Bus, 135 Mo. 325), viz.: 'A public office is the right authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.'"

We have cited authorities which establish, we believe, that the office of Assistant Prosecuting Attorney in counties of the fourth class in this State is an office under this State. We will now consider the further question whether such office is a "lucrative office".

Section 56.240, RSMo 1949, providing for the appointment and payment of compensation of one assistant by a Prosecuting Attorney of class four counties, in the last sentence of the section states:

"* * * In counties of the fourth class the assistant prosecuting attorney shall be paid only by the prosecuting attorney and may assist the prosecuting attorney at his request in any case and the former shall not be disqualified from defending in any case, civil or criminal, except those in which he shall have acted as assistant prosecuting attorney."

Honorable Curt M. Vogel

"Lucrative", as an adjective, is defined in Webster's New International Dictionary, Second Edition, page 1465, definition 1, as: "Yielding lucre; gainful; profitable; making increase of money or goods; as, a lucrative business or office."

The word "lucre", as a noun, is defined on the same page of the same work in definition 1, as: "Gain in money or goods; profit; riches."

We believe the facts submitted to us and the authorities we have read on the question, citations from which are herein quoted, conclusively determine that the office of Assistant Prosecuting Attorney in class four counties is a lucrative office under this State. This conclusion is supported by a paragraph in the Bus case, supra, l.c. 332, 333, which states:

"It can make no difference that the appointment is made by the sheriff, or that it is in the nature of an employment, or that the compensation may be fixed by contract. The power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public. Chief Justice Marshall defines a public office to be 'a public charge or employment.' U.S. v. Maurice, 2 Brock. 96. Whether a public employment constitutes the employe a public officer depends upon the source of the powers and the character of the duties."

There is no case in this State in which the phrase "lucrative office" has been defined by our Appellate Courts. The Supreme Court of Tennessee decided a case, State ex rel. Little vs. Slagle, 89 S.W. 326, 115 Tenn. 336, in which the phrase "lucrative office" was defined and its meaning was construed. That case construed a constitutional provision of Tennessee precisely the same in effect, and similar in words, to the first sentence of Section 12 of Article III of our present Constitution. The facts were in that case that a person was elected constable of a certain district in a county of that State. Thereafter, he was appointed by the sheriff of the county as one of his regular deputies. The county court, acting under such constitutional provision, without citation or notice, and without a trial, summarily declared the office of constable vacant, and appointed Slagle

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to fill the vacancy. Quo warranto was filed by the State at the relation of the ousted constable to test the right of Slagle to hold the office. The Chancellor dismissed the proceeding on demurrer. An appeal followed to the Supreme Court of that State. The Court held that a deputy in the office of the sheriff was an officer, and that the office of deputy sheriff was a "lucrative office" in the constitutional sense. Affirming the judgment of the Chancellor that Court, l.c. 326, said:

"The first question to be determined is whether the same person can hold the office of constable and that of deputy sheriff at the same time without violating article 2, sec. 26, of the Constitution of 1870, which declares that no person in this state shall hold 'more than one lucrative office at the same time.'

"Is a deputy sheriff an officer, in the legal sense of that term? and, if so is the office he holds a lucrative one in the constitutional sense?"

The Court in further discussing the case, l.c. 327, said:

"* * * Although he is appointed by the high sheriff, and holds to him the peculiar relations already mentioned, yet his rights and powers are derived from the law, and his duties are those of an officer of the law. It was so held in State ex rel. v. Bus (Mo.) 36 S.W. 639, 33 L.R.A. 616.

"Is the office of deputy sheriff a lucrative one? A lucrative office is one whose pay is affixed to the performance of its duties (State v. Kirk, 44 Ind. 401, 15 Am. Rep. 239); and, when the duties of the office are fixed by statute, it is immaterial that the compensation of the officer is fixed by some other board or officer (Chambers v. State (Ind. Sup.) 26 N.E. 893, 11 L.R.A. 613).

Honorable Curt M. Vogel

In the case of a deputy sheriff in this state, if there be no contract between him and the high sheriff as to compensation, he is entitled to the same fees that the high sheriff himself receives for the same kind of service; if there be a contract between the two as to compensation, then for such compensation as the contract may fix; but in either event the office is equally a lucrative one within the intent and meaning of the Constitution.

"Was it necessary that Mr. Little should have been cited before the county court, after he had accepted the office of deputy sheriff, before his office of constable could be legally declared vacant and a successor appointed?

"The rule at common law is that, where one accepts a second office incompatible with one already held by him, the office first held is thereby ipso facto terminated without judicial proceedings of any kind (State v. Grace, 113 Tenn. 9, 18, 82 S.W. 485; State ex rel. v. Bus, supra, and authorities cited); and the same rule obtains where the incompatibility arises from an inhibitory provision in a Constitution against holding two offices * * * ."

The Supreme Court of Indiana has construed the phrase "lucrative office" in numerous cases as applied to a provision in the Constitution of that State similar to our Section 12, Article III, supra. In the case of Creighton et al. Township Trustees vs. Piper, 14 Ind. 182, the Court held that the respective offices of supervisor of a road district and township trustee were "lucrative offices". A supervisor of a road district by the acceptance of the office of township trustee vacated his office and was not a proper party to join in the prosecution of the case. A motion to dismiss was overruled and judgment for plaintiff followed. There was an appeal to the Supreme Court. That Court in holding that both were lucrative offices, 1.c. 183, said:

"Section 9 of art. 2 of the constitution declares that no person shall hold more than one lucrative office at the same

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time; hence, it is argued that Farras, by accepting the office of trustee, vacated his office as supervisor; while, on the other hand, it is insisted that township trustee is not a lucrative office within the purview of the constitution. This latter position does not seem to be correct. Pay--supposed to be an adequate compensation--is affixed to the performance of the duties, both of trustee and supervisor. 1 R.S. pp. 462, 497, secs. 1, 19. This plainly determines each of them to be a lucrative office, and the offices cannot, therefore, be held by one person at the same time."

The same question was before the Supreme Court of Indiana in *Chambers vs. State ex rel. Barnard*, 26 N.E. 893. The Court in that case, quoting from one of its former decisions, in defining "lucrative office", 1.c. 894, said:

"* * * It is held in *State v. Kirk*, 44 Ind. 401, that the office of councilman in a city is purely and wholly municipal in its character, and such officer has no duties to perform under the general laws of the state; and, although the office is a lucrative one, it is not a lucrative office within the meaning of section 9, art. 2, of the constitution of the state. In *Mohan v. Jackson*, 52 Ind. 590, it is held that the office of city clerk is not an office within the meaning of section 16, art. 7, of the constitution of the state. It must therefore be regarded as the settled law of this state that if an office is purely municipal, the officer not being charged with any duties under the laws of the state, he is not an officer within the meaning of the constitution; but if the officer be charged with any duties under the laws of the state for which he is entitled to compensation, the office is a lucrative office within the meaning of the constitution. This, although it may be a narrow construction of the constitution, must be regarded as settled. It then remains to be determined whether the

Honorable Curt M. Vogel

office of school trustee of an incorporated town is charged with any duties under the laws of the state such as make the office a lucrative one within the meaning of the constitution. It has been held by this court that the office of township trustee, who is also school-trustee, and the office of supervisor, are lucrative officers within the meaning of section 9, art. 2, of the constitution. Creighton v. Piper, 14 Ind. 182. * * * ."

And so, in this case, the Assistant Prosecuting Attorney, under the terms of said Section 56.240, in a class four county taking his authority from the State, would have the power to perform all the duties and exercise all of the functions of the office, and would be entitled to compensation from the Prosecuting Attorney for the performance of his duties. The office would, therefore, by reason of the statute, be a "lucrative office" under this State, and, therefore, under the provisions of said Section 12 of Article III of the Constitution, a Member of the General Assembly would be, and is, prohibited from accepting or holding the office of Assistant Prosecuting Attorney in any county of the fourth class in this State.


CONCLUSION.

It is, therefore, the opinion of this Department, considering the above authorities, that a State Representative cannot be appointed Assistant Prosecuting Attorney of a county of the fourth class, under the provisions of the Constitution of this State hereinabove cited, and at the same time retain the position as a State Representative, because such office of Assistant Prosecuting Attorney is a lucrative office under this State.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY
Assistant Attorney General


S. E. TAYLOR
Attorney General

GWC:lr

INTOXICATING ALCOHOLIC
LIQUORS:

A city council is charged with the duty of determining whether a petition calling for an election to decide whether intoxicating liquor shall be sold by the drink, bears a number of names representing one-fifth of the qualified voters in such city, but the city council is not bound to follow any particular method in reaching such a determination.

June 25, 1951

Honorable Raymond H. Vogel
Prosecuting Attorney
Cape Girardeau County
Farmers & Merchants Bank Building
Cape Girardeau, Missouri

6-26-51
FILED

92

Dear Sir:

Your recent request for an official opinion has been assigned to me to answer. You thus state your opinion request:

"There has been circulated in the City of Cape Girardeau a petition to secure an election to determine whether or not intoxicating liquor by the drink may be sold in Cape Girardeau. Section 311.110 of the Revised Statutes of Missouri, 1949, provides that 'upon application by petition signed by one-fifth of the qualified voters of any incorporated city, who are qualified to vote for members of the legislature...', the city counsel shall order such election. The said Section 311.110 contains a proviso in the last paragraph thereof which states 'provided further that the board of alderman, city counsel or other proper officers shall determine the sufficiency of the petition presented by the poll books of the last previous city election.'

"The question is, how can the city counsel of the City of Cape Girardeau determine the sufficiency of the number of signers of the petition. How many signatures of qualified voters must the petition contain before it is sufficient? Shall it be one-fifth of the names of voters contained in the poll books of the last previous city election or shall it be one-fifth of the names presently contained on the registration list of the City of Cape Girardeau?

Honorable Raymond H. Vogel

"The population of the City of Cape Girardeau is a little over twenty-one thousand but there are over eighteen thousand names contained in the registration books of that city.

"Due to the great interest in this matter, I should appreciate having your Opinion as soon as possible."

The law of Missouri regarding elections in incorporated cities to determine whether or not intoxicating alcoholic liquor shall be sold by the drink in such cities is found in Section 311.110, RSMo 1949, which section reads:

"Upon application by petition signed by one-fifth of the qualified voters of any incorporated city, who are qualified to vote for members of the legislature in such incorporated city of this state, the board of aldermen, city council or other proper officials of such incorporated city shall order an election to be held in such incorporated city, at the usual voting precincts for holding any general election for state officers, to take place within forty days after the receipt of such petition, to determine whether or not intoxicating liquor, as defined in this chapter, other than malt liquor containing not to exceed five per cent of alcohol by weight, shall be sold, furnished or given away within the corporate limits of such incorporated city; such election shall be conducted, the returns thereof made and the results thereof ascertained and determined in accordance in all respects with the laws of this state governing general elections for city officers, and the result thereof shall be entered upon the records of such board of aldermen, city council or other proper officials, and the expense of such election shall be paid out of the city treasury, as in the case of an election for city officers; provided that at an election held under the provisions of this section, no one shall be entitled to vote who is not a resident of such incorporated city, or who is not a qualified

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"voter of such incorporated city; provided, that no such election held under the provisions of this section shall take place on any general election day, or within sixty days of any general election held under the constitution and laws of this state, so that such elections as are held under this section shall be special elections and shall be separate and distinct from any other election whatever; provided further, that the board of aldermen, city council or other proper officials shall determine the sufficiency of the petition presented by the poll books of the last previous city election."

(Underlining ours.)

It will be noted that Section 311.110 (quoted above) states that the petition must be signed by one-fifth of the "qualified voters of any incorporated city who are qualified to vote for members of the legislature in such incorporated city * * *."

Cape Girardeau, an incorporated city, by virtue of the fact that it has a population in excess of 10,000, is required by the laws of Missouri to have registration of voters. It does, and for many years, has required registration. In those cities where registration of voters is required no person is permitted to vote who is not registered. Therefore, it is plain that any person who is "qualified to vote for members of the legislature in such incorporated city * * *," must be registered. In other words, in order to be a qualified voter in such a city, one must be registered.

If Section 311.110, supra, had stopped at this point it would be clear that the petition would have to be signed by a minimum number of voters equal in number to one-fifth of the number of registered voters. However, Section 311.110 goes on to add, in its concluding lines, "provided further, that the board of aldermen, city council, or other proper officials shall determine the sufficiency of the petition presented by the poll books of the last previous city election." In determining the meaning and applicability of the concluding lines of Section 311.110 (quoted above) we would direct attention to the case of *Bine v. Jackson County*, 266 Mo. 228. This case was a contest of a local option election held in that portion

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of Jackson County outside of Kansas City and Independence, in which election a majority of the votes cast were against the sale of intoxicating liquor. Thereafter said Bine filed a notice to contest this said election alleging as one of several reasons, that: "Said petition was not signed by one-tenth of the qualified voters of said county outside of the corporate limits of said cities who voted at the last previous general election and whose names appear on the poll books of said election, and the county court did not so find in its order." The trial court found in favor of contestant Bine and Jackson County appealed to the Supreme Court of Missouri, which reversed the trial court and held that the election conformed to all statutory requirements. In its opinion the Court held that as long as the petition was signed by the requisite percentage of qualified voters it was sufficient; that the names of those persons signing need not be names of persons which appeared on the poll books of the last previous election; and that the county court was under no obligation, in determining whether the petition was signed by the requisite number of qualified voters, to be guided in this determination, by the poll books alone. In reaching these conclusions the Court said, in part, l.c. 238, 239:

"* * * It is clear, therefore that the purpose of the statute was simply to point out, as an aid to the finding of the court, an accessible and presumptively correct list of voters which it could use without further inquiry as evidence of the number of qualified voters then living in the county.

"* * * We know judicially, and the Legislature knew, that the poll books are not, and cannot in the nature of things be, an infallible enumeration of the qualified voters in any county where registration previous to voting is not prescribed by law. What the provision intended was that nothing else appearing the county court must find by poll books whether or not the petition was sufficient to show that it was signed by one-tenth of the qualified voters residing in the county. For it was to them the statute gave the right by proper application to compel the calling of an election.

Honorable Raymond H. Vogel

"To simplify the investigation which the county court is directed to make and to further the object of the petitioners to put the issues of local option before the people, the statute inserted the proviso that the county court should consider the prima-facie evidence of the poll books as to the qualifications and number of the petitioners, but it nowhere in words or by necessary implication confined the view of the county court to the poll books alone."

It will be noted that in the above quoted excerpts of the opinion, the Court said: "What the provision intended was that nothing else appearing the county court must find by poll books whether or not the petition was sufficient * * *." In the instant case there is something else appearing as a guide to the city council, to-wit, the registration list.

In view of the Bine opinion, and the facts in the instant case, it is our belief that the city council, indetermining the sufficiency of the number of names attached to the petition, is charged with the final duty of determining the adequacy of the petition from the standpoint of whether or not it is signed by the required percentage of qualified voters, but that the city council is not bound to follow any particular method in so determining.

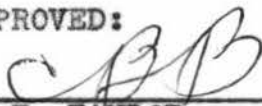
CONCLUSION

It is the opinion of this department that the city council is charged with the duty of determining whether a petition, calling for an election to decide whether intoxicating liquor shall be sold by the drink, bears a number of names representing one-fifth of the qualified voters in such city who are qualified to vote for members of the legislature, but that the city council is not bound to follow any particular method in reaching such a determination.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

HPWab

TAXATION:

Taxes collected for County Health Centers
paid into county treasury.

HEALTH CENTERS:

COUNTY TREASURER:

January 22, 1951

1-23-51

Honorable Wayne W. Waldo
Prosecuting Attorney
Pulaski County
Waynesville, Missouri



Dear Mr. Waldo:

This is in reply to your request for an opinion
which is as follows:

"The opinion of the Attorney General is
respectfully requested on the following
situation:

"In Pulaski County, there is a one mill
tax on each \$1.00 of assessed valuation
which is used for County Health purposes.
There is also a County Health Council, a
corporation, duly incorporated and auth-
orized to carry on business as such, with
a Treasurer under bond to perform his duties
as such Treasurer.

"Since the County Health Council is a cor-
poration, and since the Treasurer of the
County Health Council is under bond, can
the County Collector pay over the money
from the one mill tax, as it is received,
to the Treasurer of the County Health Coun-
cil, in the same manner as is done in the
case of a Consolidated School District or
a Special Road District; or do the funds
have to be handled as in a regular account
of the County?

"This opinion is asked at the instance of
the County Court of Pulaski County, and the
County Court also urges that this opinion be
obtained as soon as possible, since money
will have to be expended from this fund in a
few days to meet current expenses."

Honorable Wayne W. Waldo

In answering your question we will set out below several statutes which we believe applicable to the matter under consideration.

Section 205.040, RSMo 1949, provides for the organization of County Health Centers and reads as follows:

"The location, building, maintenance and operation of said public county health center shall be vested in a bona fide organization of at least two hundred and fifty resident members, paying annual dues each of at least one dollar, be a corporate body, constitution and bylaws legally adopted and its officers legally elected and qualified, and when so formed, shall be the legal and official body in the county or counties for the promotion of health activities in said county or counties. It shall cooperate with the division of health of the department of public health and welfare or its successors and shall be empowered to enter into contracts and agreements with state and federal health authorities for the furtherance of all health activities, except as herein prohibited. All personnel for the operation of the public health center shall be appointed and their compensation shall be fixed by the official organization. It shall have power to formulate, adopt and require such rules and regulations as may be needed for the operation of the center, not inconsistent with the laws of the state. It shall have exclusive control of the expenditures of all moneys collected to the credit of the health center fund; provided, that all moneys received for such health center shall be deposited in the treasury of the county to the credit of the health center, and paid out only upon warrants ordered drawn by the county court of said county or counties upon the properly authenticated vouchers of said official organization."

(Underscoring ours.)

Honorable Wayne W. Waldo

Section 54.100 RSMo 1949, provides, in part, that: "He (county treasurer) shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court." (Words in parentheses ours.)

Section 54.140, RSMo 1949, provides for the county revenue to be kept in separate funds, and reads as follows:

"It shall be the duty of the county treasurer to separate and divide the revenues of such county in his hands and as they come into his hands in compliance with the provision of law; and it shall be his duty to pay out the revenues thus subdivided, on warrants issued by order of the court, on the respective funds so set apart and subdivided, and not otherwise; and for this purpose the treasurer shall keep a separate account with the county court of each fund which several funds shall be known and designated as provided by law; and no warrant shall be paid out of any fund other than that upon which it has been drawn by order of the court as aforesaid. Any county treasurer or other county officer, who shall fail or refuse to perform the duties required of him or them under the provisions of this section and chapters 136 to 154, RSMo 1949, and in the express manner provided and directed, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars, and not more than five hundred dollars, and in addition to such punishment, his office shall become vacant."

Section 139.220, RSMo 1949, provides for the collector to pay his collections into the county treasury, and is as follows:

"Every collector of the revenue having made settlement, according to law, of county revenue by him collected or received, shall pay the amount found due

Honorable Wayne W. Waldo

into the county treasury, and the treasurer shall give him duplicate receipts therefor, one of which shall be filed in the office of the clerk of the county court, who shall grant him full quietus under the seal of the court."

In view of the various statutes setting forth the duties of the county treasurer, and particularly in view of the clearly stated language contained in Section 205.040, supra, which we have underlined, there seems to be no doubt but that the money is to be paid into the county treasury and there kept in a separate fund to be paid out only upon warrants ordered drawn by the county court.

In this connection we believe it well to point out the conclusion stated in an opinion to Honorable Edgar Mayfield under date of January 10, 1950, to the effect that the control over the expenditures of these moneys is exclusively vested in the health center organization and when the county court receives a properly authenticated voucher from the official health center organization to cover an expenditure for a purpose within the control of said organization, a warrant must be issued.


CONCLUSION.

Therefore, it is the opinion of this department that the taxes collected for County Health Centers are to be paid into the county treasury and not turned over to the treasurer of the County Health Center Council. The moneys to be deposited in a separate fund and paid out only upon warrants ordered drawn by the county court.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

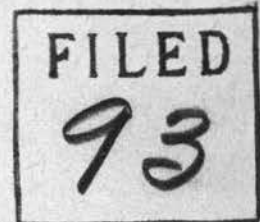
PROSECUTING ATTORNEY'S
FEES:

In criminal cases prosecuting attorney's
fee shall not be charged as costs unless
conviction be obtained.

February 9, 1951

2-9-51

Mr. Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri



Dear Mr. Wallach:

We are in receipt of your recent request for an official
opinion, which request is as follows:

"Where the Prosecuting Attorney files
information and prosecutes a misdemeanor
case before a Magistrate, and the Magistrate
after hearing same dismisses the case on pay-
ment of costs, should the Prosecuting Attor-
ney's fee be taxed as Court costs?"

It appears that your question is based upon a certain clause
in Section 56.310, RSMo 1949, which allows the prosecuting attorney
a fee of five dollars "for the conviction of every defendant in the
circuit court, upon indictment or information, or before a magistrate
court, upon information, when the punishment assessed by the court
or jury or magistrate shall be fine or imprisonment in the county
jail, or by both such fine and imprisonment."

The Supreme Court of Missouri in 1860 handed down a decision
on this point in State v. Beard, 31 Mo. 34. In that case the court
held that where the prosecution of an indictment was dismissed, on
motion of the circuit attorney, at the costs of the defendant, the
attorney's fee could not be taxed as costs against the defendant.

This question was adjudicated in another case in 1873, State
v. Foss, 52 Mo. 416. In the course of that opinion the court said:

Stanley Wallach

"The only question in the case is, whether the Circuit Attorney was entitled to a fee. The section of the statute which controls and determines this case, (1 Wag. St., p. 619, Section 2) declares that for conviction upon indictment, when the punishment assessed by the court or jury shall be a fine or imprisonment in the county jail, or both such fine and imprisonment, the Circuit Attorney shall be allowed a fee of five dollars.

"The reading of the statute is plain and divested entirely of ambiguity. A pre-requisite to receiving the fee, is a conviction upon the indictment and an assessment by the court of a punishment, either by fine or imprisonment, or both. Was there any conviction or punishment assessed in this case? There was no arraignment or plea, of either guilty or not guilty. There was no determination of guilt or innocence by the court, and no judgment or assessment of a fine or imprisonment. The judgment was founded upon an agreement, by which a conviction, fine and imprisonment were waived if the defendant would simply pay the costs. It is true, costs naturally follow and are incident to a judgment of conviction, but here we see there was no conviction within the meaning of the law. The criminal statutes fully designate what is intended by a conviction. It is clearly where, by a trial or confession the defendant is assessed to pay a fine or be imprisoned, or is punished by both these modes. But there is no conviction for costs only, to entitle the Circuit Attorney to his fee. A case similar to this was recently passed upon at the February Term, and decided in accordance with these views."

The cases cited above seem to be almost identical with your problem. It appears that no conviction is obtained in your case. It is the law in Missouri, according to the decisions of the Supreme Court, that the prosecuting attorney's fee cannot be charged unless a conviction be obtained. The conviction is a pre-requisite for the fee.

Stanley Wallach

CONCLUSION

It is the opinion of this department that, where the prosecuting attorney files information and prosecutes a misdemeanor before a magistrate, and the magistrate, after hearing the case, dismisses the action at the cost of the defendant, the prosecuting attorney's fees should not be taxed as court costs.

Respectfully submitted,

B. A. TAYLOR,
Assistant Attorney General

APPROVED:

OK

J. E. TAYLOR
Attorney General

BAT:hr

RECORDS, BOUND: Record sheets assembled in a loose-leaf binder equipped with a locking device would be considered to be a "bound" record.

April 24, 1951

4-21-51

Honorable Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri



Dear Sir:

Your recent request for an official opinion has been assigned to me to answer. You thus state your opinion request:

"This office will deeply appreciate it if you would be kind enough to let us have the opinion of your office on the following point:

"Sec. 59.410 R.S.Mo. 1949 provides: Wherever the statutes require deeds, mortgages, conveyances, deeds of trust, bonds, covenants, documents, marriage contracts, certificates of marriage, commissions, official bonds, statements, records, plats, surveys, schedules, papers, patents, or other instruments of writing to be recorded, the making of photographic copies of such deeds or other instruments of writing shall be deemed recording within the meaning of this chapter. Such photographic copies shall be bound, paged and indexed wherever it is so provided for deeds or other instruments recorded by hand, and such photographic copies when bound together shall be deemed record books within the meaning of this chapter.

"When photographing recorded instruments on individual sheets it is customary to assemble the sheets in loose-leaf binders and then bind them in book size. This has proved to be an expensive procedure.

Honorable Stanley Wallach

"In your opinion, would a loose-leaf binder equipped with a locking device be considered a bound record as referred to in the foregoing section?"

In the above you are asking us whether record sheets assembled in "a loose-leaf binder equipped with a locking device" could be considered a "bound record" as the term "bound record" is used in Section 59.410, RSMo 1949. Our first consideration, therefore, must be the meaning of the term "bound record."

Webster's New International Dictionary, in its definition of the word "bound" states: "Enclosed in a binding or cover, as, a bound volume." The same dictionary in its definition of the word "bind" states: "To sew or fasten together and enclose in a cover; as, to bind a pamphlet, to bind a book."

In the case of John Kitchen, Jr., Co. v. Levison, 188 Fed. Rep., 658, the Court was engaged in determining whether a particular association of paper sheets could be said to be "bound" in a book. In its consideration of that matter, the Court stated, l.c. 661, 662:

"* * * But, after all is said, it nevertheless is apparent that the appellant's carbon sheets are bound in the book. It is true that they are not permanently bound, and that they may readily be removed; but the appellee's claims do not in terms call for a permanent binding. The appellant's book is made up of recording leaves, each divided into three sections by vertical lines of perforations, as are those of the appellee. The leaves and cover of the book are bound together by staples. The double carbon sheets are attached at one end to a cardboard strip with notches opposite the staples to allow of their being inserted in the book. They are pushed in underneath the cover of the book, and between and on either side of the staples. In the appellant's patent which was issued on February 9, 1909, it is said:

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"The pressure on the points 11 of the stub strip, after the latter has been inserted, will hold the carbon permanently in position."

"And again it is said:

"They are held firmly in place just as though they had been bound in the book originally."

"According to the evidence, there are various known methods of binding, as by binding by a clamp, by glue or paste, or by pressure, as well as by sewing or stitching. In the appellant's patent no specific means for binding or holding the carbon sheets in the recording sheets is described. The claims are broad enough to cover any binding means. The patentee of the appellant's patent, testifying as to the Doughty patent, in which the carbon and stubs of the recording sheets are held in a wire frame which is attached to the cover of the book, said that the carbon sheet in that patent is 'bound in the book' by a spring. We think that it is immaterial that the carbon sheets in the appellant's patent are detachable from the book, or that they are bound in the book after the book is made up. They are to all intents and purposes, when the book is in use, bound in the book within the meaning of the appellee's claims."

In view of the definitions given above of the meaning of "bound" and "bind," and of the case cited, it is the opinion of this department that record sheets assembled in a loose-leaf binder equipped with a locking device would be considered a bound record.

Honorable Stanley Wallach

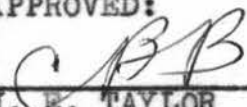
CONCLUSION

It is the opinion of this department that record sheets assembled in a loose-leaf binder equipped with a locking device would be considered to be a "bound" record.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

HPWab

TOWNSHIP COLLECTOR:
COMMISSIONS:

A township collector shall receive a commission of $2\frac{1}{2}\%$ on the first \$40,000 collected during the year or annual term of his office prior to his final settlement in March of each year, and 1% on the next \$40,000 collected, and $\frac{3}{4}$ of 1% on the remainder and that the period of time during which said collections are made is not affected by the fact that the collections may have been made in two different calendar years.

January 18, 1951

Honorable Joe C. Welborn
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri

FILED

95

1-19-51

Dear Mr. Welborn:

You have requested an official opinion by this department upon the following proposition as set forth in your letter:

"The collector of this County has asked me to write you for an official opinion on the meaning of a certain sentence in section 14014 R.S. Mo., 1939. Stoddard County is a county operating under township organization. The portion of the section referred to is as follows:

"He (township collector) shall receive a commission of two and one-half per cent on the first forty thousand dollars collected; one per cent on the next forty thousand dollars collected; and three-fourths per cent on the remainder of all moneys collected by him."

"The question is: what period of time is covered by the above provision. Some of the township collectors contend that they may get the tax books in November, retain $2\frac{1}{2}\%$ per cent of the first \$40,000.00 collected for the remainder of the year, and then after the start of the new year, retain $2\frac{1}{2}\%$ per cent of the first \$40,000.00 collected."

Section 139.430, R.S. Mo. 1949, subsection 4 provides as follows:

"4. The township collector shall receive a commission of two and one-half per cent

Hon. Joe C. Welborn

on the first forty thousand dollars collected; one per cent on the next forty thousand dollars collected; and three-fourths of one per cent on the remainder of all moneys collected by him." (Sec. 14014, R.S. 1939, A. 1949, S.B. 1024)

Section 139.420, R.S. Mo. 1949, (Sec. 14,000 R.S. Mo. 1939, A. 1949, S.B. 1024) reads as follows:

"The township collector of each township at the term of the county court to be held on the first Monday in March of each year, shall make a final settlement of his accounts with the county court for state, county, school and township taxes; produce receipts from the proper officers for all school and township taxes collected by him, less his commission; pay over to the county treasurer and ex officio collector all moneys remaining in his hands, collected by him on state and county taxes; make his return of all delinquent or unpaid taxes, as required by law, and make oath before the court that he has exhausted all the remedies required by law for the collection of such taxes.

"2. On or before the twentieth day of March in each year, he shall make a final settlement with the township board.

"3. If any township collector shall fail or refuse to make the settlement required by this section, or shall fail or refuse to pay over the state and county taxes, as provided in this section, the county court shall attach him until he shall make such settlement of his accounts or pay over the money found due from him; and the court shall cause the clerk thereof to notify the director of revenue and the prosecuting attorney of the county at once of the failure of such township collector to settle his accounts, or pay over the money found due from him, and the director of revenue and the prosecuting attorney shall proceed against such collector in the manner provided in section 139.440, and such collector shall be liable to the penalties provided in section 139.440. (Sec. 14000, A. 1949, S.B. 1024)".

Hon. Joe C. Welborn

The township collector takes office within ten days after he has been notified of his election. He is elected the last Tuesday in March, biennially. I assume that your township collector was elected the last Tuesday in March, 1949, (See Secs. 65.060; 65.110 and 65.160, R. S. Mo. 1949). Since the township collector's term of office commences on or about April 1st after he is elected the last Tuesday in March, then the year of his office would not be the calendar year but would be the year of his term of office or 365 days from the time that he took office.

The fact that he is to make his yearly settlements the first Monday in March of each year to the county court which will be a final settlement of his accounts and the fact that he must make his final settlement with the township board on or before the 20th day of March in each year convinces us that his commission is based upon the collections made during the prior year of his office and not the collections made in each calendar year. If he would fail to make his yearly final settlements, then as the statute Section 139.430 is worded he would only be entitled to the commission set forth in said Subsection 4, the entire period covered by his settlement, that is, for the two year term of his office.

The Supreme Court of Missouri in the case of State v. Linville, 300 S.W. 1066, 1.c. 1067, said:

"4. Section 10938, R.S. 1909, provides for ascertaining the 'annual' salary. Section 11352, R. S. 1919, says that the superintendent shall receive so much money, dependent upon the population of the county, without saying whether it was per annum. From the context it must be presumed that annual salary was meant. 'Annual salary,' as used in said section 10938, means salary for each year of the incumbency. It cannot be split up into periods by elections which occur during the year, and must be calculated on a year as a whole. We conclude further that 'annual,' as applied to salaries, means not the calendar years, but the years of the incumbent's term, which in the case of relator begins on the 1st day of April each year."

This case and the quotation cited above was quoted with approval by the Supreme Court of Missouri in the case of Simms v. Clinton

Hon. Joe C. Welborn

County, 8 S.W. 2d 69, 1.c. 70.

Townships are political subdivisions of the state and a compensation of the township collector is subject to terms prescribed by the Legislature. (See Barton County vs. Walser, 47 Mo. 189, 52 Am. Jur. page 482.)


CONCLUSION

It is the opinion of this department that a township collector shall receive a commission of $2\frac{1}{2}\%$ on the first \$40,000 collected during the year or annual term of his office prior to his final settlement in March of each year, and 1% on the next \$40,000 collected and $\frac{3}{4}$ of 1% on the remainder and that the period of time during which said collections are made is not affected by the fact that the collections may have been made in two different calendar years.

Respectfully submitted,

STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

SJM:mw

TUITION: Discretionary with board of directors of school district whether or not nonresident pupils shall
SCHOOLS: be admitted. Board of directors of school district may prescribe tuition for nonresident pupils and refuse admission if tuition is not paid.

January 31, 1951



Honorable Wm. H. Wessel
Prosecuting Attorney
Gasconade County
Hermann, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department, which reads as follows:

"I have a problem confronting Reorganized School District R-3, Gasconade County, Missouri.

"This School District, Bland, Mo., Consolidated District adjoins Belle, Missouri, School District, which is in Osage County, Missouri.

"Belle and Bland, that is both districts, have the same facilities, that is grade school and four year high school. However some in the Belle district are sending their students to the Grade School in Bland, that is R-3.

"Here are the two questions I would like answered.

"1. Must the Board in the Bland District, that is, R-3 permit the students from the adjoining county and district, that is the Belle District, attend their school, that is, R-3?

"2. Can the Board in R-3 set a tuition fee for these students attending from the adjoining county, Belle District, and if said tuition is not paid, then refuse admission?"

Honorable Wm. H. Wessel

Generally, the questions which you have submitted relate to pupils attending school in a district other than in which they reside and the right of the school district wherein the nonresident pupils attend school to require a tuition fee and refuse admission for nonpayment of same.

Your attention is directed to Section 163.010, R.S. Mo. 1949 (Section 10340, R.S. Mo. 1939), which provides as follows:

"The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district - said rules to take effect when a copy of the same, duly signed by order of the board, is deposited with the district clerk, whose duty it shall be to transmit forthwith a copy of the same to the teachers employed in the schools; said rules may be amended or repealed in like manner. They shall also have the power to suspend or expel a pupil for conduct tending to the demoralization of the school, after notice and hearing upon charges preferred, and may admit pupils not residents within the district, and prescribe the tuition fee to be paid by the same, except as provided for in section 165.257; provided, that the following children, if they be unable to pay tuition shall have the privilege of attending school in any district in this state in which they may have a permanent or temporary home: First, orphan children; second, children bound as apprentices; third, children with only one parent living, and fourth, children whose parents do not contribute to their support; provided further, that any person paying a school tax in any other district than that in which he resides shall be entitled to send his or her children to school in the district in which such tax is paid and receive credit on the amount charged for tuition to the extent of such school tax." (Emphasis ours.)

In the above statute reference is made to Section 165.257, which is the statute providing for the sending of pupils to high schools in districts other than in which they reside, where their own district does not maintain an approved high school, and the payment of tuition for said pupils.

Honorable Wm. H. Wessel

In reading your request it appears that you are concerned with the problem of grade school pupils attending school in a school district other than where they reside.

Section 163.010, supra, provides that the board of directors of a school district may admit pupils who do not reside within the district and prescribe the tuition fee to be paid. Following this provision an exception is provided whereby certain types of children may attend school in a school district wherein they may have a permanent or temporary home without paying any tuition. The statute then provides that a person has the right to send his children to school in a district other than where he resides, provided said person is paying a school tax in the receiving district. However, it does not appear in your letter that the school children to which you refer fall within the exception as set out in the statute, nor do their parents pay any school tax in the school district where they are sending their children, i.e., the Bland District.

Therefore, in answer to your first question we believe that it is discretionary with the board of directors of the school district whether or not nonresident grade school pupils from another school district, whose parents pay no school tax in what would be the receiving district, shall be admitted to attend school in the receiving district.

In answer to your second question, Section 163.010, supra, clearly provides that the board of directors of a school district in admitting nonresident pupils has the right to "prescribe the tuition fee to be paid by the same." We believe that where such tuition is set by the board of directors of the school district that the board has the right to refuse admission to nonresident pupils if tuition is not paid.

In the case of *Binde v. Klinge*, 30 Mo. App. 285, an action was brought to restrain the directors of the school district of the town of Hermann, in Gasconade County, from refusing a girl the privilege of attending the public school within said school district without paying the tuition as a nonresident pupil. The girl was living with her grandmother in the town of Hermann, and her father was living in Montgomery County. In deciding the question the court, at l.c. 286, 287, 288, said:

" * * * Several interesting questions arise upon the record, which we think it unnecessary to consider, because we have come to the conclusion that upon an interpretation of section 7045, Revised Statutes, as amended by the act of March 28, 1885 (Laws of 1885, p. 240), the child Paula was not, under the undisputed evidence, entitled to attend the school without the payment of tuition as a non-resident pupil. The statute, as amended, reads as follows: 'The board shall have power to make all needful rules and regulations for the organization, grading, and government in their school district; * * * and may admit pupils not residents within the district, and prescribe the tuition fee to be paid by the same: * * *

* * * * *

" * * * Section 7049, Revised Statutes, provides for an enumeration of children 'resident in the district'; and the section above quoted, which governs the question before us, empowers the directors to admit pupils 'not residents within the district and prescribe the tuition fee to be paid for the same.' In view of the use of the word 'resident' in the statute, if the statute stood as it was before the amendment of 1885, we should have considerable difficulty in saying that a child, who has come to live permanently with its grandmother without any expectation of returning to its parental residence while the grandmother lives or while the child, being a female, remains unmarried, and who has not been sent there merely for the purpose of acquiring the privileges of a better school than exists at her actual domicile, is not a 'resident' of such school district, although her father may reside elsewhere in the state with the remaining portion of his family, as in this case. But the act of 1885, as above seen, adds a proviso extending the privilege of attending school to a certain class of non-residents in the following language: 'That

orphan children, or any children bound as apprentices, shall have the privilege of attending school in any district in the state of Missouri in which they may find a permanent or temporary home, without paying a tuition fee.' By thus admitting to the privilege of attending school without the payment of tuition a class of non-residents whose claim to be regarded as residents, on general principles, is stronger than that of the child here in question, the legislature necessarily exclude the idea that other non-resident children are entitled to the privilege. This proviso to the statute seems to determine the question against the plaintiff, in conformity with the maxim, expressio unius exclusio alterius. As the child Paula is neither an orphan nor bound as an apprentice, it seems that she is excluded from the privilege of attending the school at Hermann without the payment of tuition, by this amendatory proviso, which must be regarded as a legislative interpretation of the whole statute."

The above case has been followed in the more recent case of Cape Girardeau School Dist. No. 63 v. Frye, 225 S.W. (2d) 484, which involved an action by a school district to recover tuition from the parents of nonresident pupils residing in another county who sent their children to the plaintiff school district. In construing Section 10340, R.S. Mo. 1939, which is the same as Section 163.010, supra, the court, at 1.c. 488, 489, said:

" * * * We have already pointed out that Section 10340 empowers the board to admit pupils not resident within the district and to prescribe the tuition fee which such pupils must pay. The section then goes on to provide that certain classes of children may attend without the payment of tuition; and by thus limiting the privilege to certain definitely specified classes, it necessarily excludes the idea that other nonresident children are entitled to the privilege. Binde v. Klinge, supra. * * *"

Honorable Wm. H. Wessel

In view of the foregoing authorities your second question is answered in the affirmative.

CONCLUSION

It is therefore the opinion of this department that it is discretionary with the board of directors of a school district whether or not nonresident grade school pupils from another school district shall be admitted to attend school in what would be the receiving school district.

It is also the opinion of this department that the board of directors of a receiving school district wherein a tuition fee has been set to be paid by nonresident pupils has the right to refuse admission of nonresident pupils to the school in said receiving district, if said tuition is not paid.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

SCHOOLS: Under Public Law 815 - 81st Congress - State Board of Education is proper state agency to carry out
STATE AID : purposes of the act and direct investment of moneys received and paid by the Federal government to the State Treasurer.

February 15, 1951

2-16-51

Honorable Hubert Wheeler
Commissioner of Education
Department of Education
Jefferson City, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department, which, in part, reads:

"Last year Congress enacted, Public Law 815-81st Congress, a law providing for surveys and state plans for school construction. This law authorizes an appropriation of federal funds to assist the several states to inventory existing school facilities, to survey the need for the construction of additional facilities in relation to the distribution of school population, to develop state plans for school construction programs and to study the adequacy of state and local resources available to meet school facility requirements. The federal act provides that each state shall be entitled to receive an amount equal to 50 per centum of its expenditures in carrying out the purposes of the act.

"In setting up state plans for the carrying out of this act it is necessary to indicate the proper state agency authorized to accept federal funds and the educational agency authorized to make application for funds under the federal school facilities survey act.

* * * * *

Honorable Hubert Wheeler

" * * * I shall appreciate your advice and official opinion and response to the following questions:

"1. Are the laws of this state adequate for the acceptance of the federal act, Public Law 815--81st Congress, providing for survey and state plans for school construction programs?

"2. Is the State Board of Education the proper educational agency for the acceptance of federal funds, administration, and the carrying out of the federal act?

"3. Is the state treasurer the designated custodian for such accepted federal funds?"

In answer to your first question your attention is directed to Section 162.020, R.S. Mo. 1949, which specifically accepts the provisions of certain acts of Congress pertaining to vocational education. However, you will note that the last portion of said section provides as follows:

" * * * and any other subsequent acts of congress which may provide federal funds for public schools or other educational agencies and for the necessary administration and supervision of the same, be and are hereby accepted."

Clearly, Public Law 815 - 81st Congress - is an act of Congress providing Federal funds for public schools or other educational agencies within the meaning of the above-quoted statute.

Section 162.030, R.S. Mo. 1949, provides as follows:

"That the benefits of all funds appropriated under the provisions of such acts are hereby accepted as provided in such acts."

The later section in accepting the benefits of all funds appropriated under the provision of such acts would, by reference, include the "subsequent acts of congress which may provide federal funds for public schools or other educational agencies."

Consequently, it is our thought that the provisions of the above statutes, as set out, constitute an acceptance of Public

Honorable Hubert Wheeler

Law 815 - 81st Congress - and an acceptance of the benefits bestowed thereunder. Therefore, your first question is answered in the affirmative.

In answering your second question we will consider whether the State Board of Education is the proper educational agency and the sole agency (as defined in paragraph (13) of Section 210) for carrying out the purposes of Section 101 of the Federal Act.

Paragraph (13) of Section 210, Public Law 815 - 81st Congress, provides as follows:

"The term 'State educational agency' means the officer or agency primarily responsible for the State supervision of public elementary and secondary schools."

In determining the "State educational agency" primarily responsible for the state supervision of public elementary and secondary schools in the State of Missouri, attention is directed to Section 1, Article IX of the Constitution of Missouri, 1945, which, in part, provides:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. * * *"

Section 2, Article IX of the Missouri Constitution, further, in part, provides:

"The supervision of instruction in the public schools shall be vested in a state board of education, consisting of eight lay members appointed by the governor, by and with the advice and consent of the senate; provided, that at no time shall more than four members be of the same political party. The term of office of each member shall be eight years, except the terms of the first appointees shall be from one to eight years, respectively. * * *

Honorable Hubert Wheeler

" * * * The board shall select and appoint a commissioner of education as its chief administrative officer, who shall be a citizen and resident of the state, and removable at its discretion. The board shall prescribe his duties and fix his compensation, and upon his recommendation shall appoint the professional staff and fix their compensation. The board shall succeed the State Board of Education heretofore established, with all its powers and duties, and shall have such other powers and duties as may be prescribed by law."

Pursuant to Section 2, Article IX of the Constitution, supra, Section 160.090, R.S. Mo. 1949, was enacted, which, in part, provides:

"1. It shall be the duty of the state board of education to select and appoint a commissioner of education as its chief administrative officer, who shall be a citizen and resident of the state at least one year immediately preceding his appointment, and removable at its discretion. The commissioner of education shall be a person who possesses educational attainment and breadth of experience in the administration of public education. The board shall prescribe the duties of the commissioner and fix his compensation, and upon his recommendation shall appoint the members of the professional staff and fix their compensation."

"2. The state board of education shall:

(1) Carry out the educational policies of the state relating to public schools as may now or hereafter be provided by law.

(2) Direct the investment of all moneys received by the state to be applied to the capital of any fund for educational purposes and to see that such funds are applied to such branches of educational interest of the state as by grant, gift, devise or law they were originally intended, and if necessary to institute suit for and collect the

same and return it to its legitimate channel.

(3) Cause to be assembled such information relative to the public schools of the state as will reflect continuously their condition and management.

* * * * *

(9) Make a report, annually on or before the first Wednesday after the first day of January, to the general assembly, when that body shall be in session; otherwise to the governor, for publication and transmission to the general assembly; said report to be for the last preceding school year, and to include; (a) a statement of the number of public schools in the state, the number of pupils attending such schools, their sex, and the branches taught; (b) a statement of the number of teachers employed, their sex, their professional training, and their average salary; (c) a statement of the receipts and disbursements of public school funds of every description, their sources, and the purposes for which they were disbursed; (d) suggestions for the improvement of public schools; and (e) such other information relative to the educational interests of the state as the law may require or the board may deem important.

(10) Require from the chief officer of each of the several divisions of the department of education, on or before the thirty-first day of August of each year, reports containing such information as the board deems important and desires for publication."

Inasmuch as the above-quoted section lodges the duty with the State Board of Education to assemble information relative to the public schools of the state, reflecting their condition and management and such other information relative to the educational interests of the state, we believe that the Board is the sole and proper "State educational agency" to carry out the purposes of Section 101, Title I, Public Law 815 - 81st

Honorable Hubert Wheeler

Congress, and is therefore the proper agency to make the inventory and survey of existing school facilities as contemplated by the act.

Regarding the proper state agency which will be custodian of moneys which may be made available to the State of Missouri from the appropriation as provided in Section 101, Public Law 815 - 81st Congress, attention is directed to Section 15, Article IV of the Constitution of Missouri, 1945, which, in part, provides:

"All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. * * *

Under the language of the above-quoted constitutional provision the grant of moneys to the State of Missouri under Public Law 815 - 81st Congress would constitute "moneys received by the state" which would be deposited in the state treasury and which would be held by the State Treasurer for the benefit of the respective fund to which they would belong.

Consequently, in answer to your third question the moneys given by the Federal government under authority of Section 101, Public Law 815 - 81st Congress, to the State of Missouri, and accepted by the State of Missouri, would be placed in the state treasury and be under the custody of the State Treasurer, and the State Treasurer would be the proper and legal custodian of said funds. The State Treasurer, as the custodian of said funds, would be the proper official to whom the Secretary of the Treasury of the United States would make payments for the use of the state educational agency in carrying out its function pursuant to Title I of the Federal Act.

Under Section 160.090 (2), supra, the authority is given to the State Board of Education to direct the investment of all moneys received by the state for educational purposes by

Honorable Hubert Wheeler

grant, gift, devise or law.

Furthermore, regarding allotments or grants of funds from the Federal government to the State of Missouri for educational purposes, Section 10.120, Laws of Missouri, 1949, page 195, provides as follows:

"All allotments, grants and contributions of funds from the Federal Government which may be received for the period beginning July 1, 1949 and ending June 30, 1951, which may be paid into the State Treasury, under the provisions of Federal Acts which provide aid for public elementary and secondary schools, adult education, improvement of teacher preparation, construction of elementary and secondary public school plant facilities, and funds for the necessary administration and supervision, shall stand and are hereby appropriated to the State Board of Education. The State Comptroller is hereby authorized to prepare and certify to the State Auditor, and the State Auditor is hereby authorized to issue warrants for any such funds in the State Treasury, all in the manner required by rule and regulation prescribed by Federal authority or by the State Board of Education."

Under the above section any moneys paid by the Federal government to the state under authority of Public Law 815 - 81st Congress - now stands appropriated to the State Board of Education and would be paid out by warrant as prescribed by said Board.

CONCLUSION

It is therefore the opinion of the Attorney General of the State of Missouri that the laws of this state are adequate in constituting an acceptance of the provisions of Public Law 815 - 81st Congress - and benefits derived from appropriations made thereunder.

Honorable Hubert Wheeler

It is further the opinion of the Attorney General that the State Board of Education is the sole and proper "State educational agency," as defined in paragraph (13) of Section 210 of the Federal Act, for carrying out the purposes of Section 101 of said act.

The Attorney General is also of the opinion that funds paid to the state under authority of Title I, Public Law 815 - 81st Congress, would be deposited in the State treasury and would be under the custody of the State Treasurer, and that said funds would be disbursed as directed by the State Board of Education.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

CONSTITUTIONAL LAW: Section 11, Article X of the Constitution as amended, provides two methods of increasing school tax levy above constitutional limit. Information to be on
SCHOOLS: ballots used in elections for tax levy
TAXATION: increase should include rate, purpose
ELECTIONS: and period of levy.

March 8, 1951

Honorable Hubert Wheeler
Commissioner of Education
Capitol Building
Jefferson City, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department, which reads as follows:

"Each year before the annual school elections in April many inquiries come to this department concerning the form of official ballot that may be used for the authorization, by the voters of the district, of school tax levies when such levies are in excess of the tax rate that may be authorized by the Board of Education without voter approval.

"Section 165.110, R.S. 1949 (10366 A.L. 1949, page 585) sets out by funds the purposes for which school moneys may be raised and disbursed. The treasurer of each school district is authorized and required to set up six funds for the accounting of all school moneys: Incidental Fund, Teachers Fund, Free Textbook Fund, Building Fund, Sinking Fund and Interest Fund. The patrons of any school district are authorized to vote an additional levy for three of the established fund accounts, namely, Teachers Fund, Incidental Fund and Building Fund.

"Section 11, Article 10, of the Missouri Constitution, as amended, sets the basic levy for school districts which may not

Honorable Hubert Wheeler

be exceeded by Boards of Education. This law further provides that school districts may increase the rate of taxation for their respective purposes when the rate and the purpose of the increase are submitted to the qualified electors who shall favor by the required vote therefor.

"Boards of Education find difficulty in phrasing the wording when submitting propositions for authorizing additional tax levies that can readily be understood by the voters and at the same time comply with the provisions of the law. A lack of uniformity exists throughout the state when such tax levy propositions are submitted to the voters.

"Last year the Board of Education of a town school district submitted a proposition, which seemed to be rather specific and clear for voter interpretation, to the voters for the purpose of authorizing an additional levy as follows:

"To vote a levy of \$1.00 on the one-hundred dollars assessed valuation for incidental purposes in addition to the \$1.00 on the one-hundred dollars assessed valuation that may be levied by the Board of Education without voter approval. (This makes a total levy of \$2.00 for teacher and incidental purposes which is the same as the present levy.)

"Note to voters: To cast a vote in favor of the levy, place a cross (X) mark in the square opposite the words "for the levy"; to vote against the levy, place a cross (X) mark in the square opposite the words "against the levy."

FOR the Levy

☐

AGAINST the Levy

☐

Honorable Hubert Wheeler

"The foregoing proposition contains a proposal for the approval of an additional tax rate for only one purpose, namely, incidentals. In some districts it may be necessary to authorize additional levies for the Teachers Fund or the Building Fund. Since there is lack of uniformity in submitting tax levy propositions and many inquiries are being made about the proper form of tax levy propositions to be submitted, I shall be glad to have your advice and official opinion in regard to the following questions:

"1. Does the foregoing proposition for the authorization of additional levy, which was submitted by a town school district, come within the legal provisions of the constitutional requirements for authorizing such tax levy? If it should fail to meet legal requirements, what modification would be necessary to make it a valid proposition?

"2. If the Board of Education found it necessary to submit a proposition for authorizing additional levies for more than one purpose, such as incidental purposes and teachers fund purposes, would a single proposition for both purposes be valid if submitted in the following form?

"To vote a levy of 50 cents on the one-hundred dollars assessed valuation for incidental purposes, and 50 cents on the one-hundred dollars assessed valuation for the teachers fund purposes; said levies to be in addition to the \$1.00 on the one-hundred dollars assessed valuation that may be levied by the Board of Education without voter approval."

Generally, the questions which you have asked relate to the manner in which a proposition for a school tax levy above the constitutional limit should be submitted to the voters on the official ballot on which they would cast their votes in favor of or against said levy.

Honorable Hubert Wheeler

Section 11, Article X of the Constitution of Missouri, 1945, provided, among other things, for school districts increasing the rates of taxation above the constitutional limitation. At the general election held the first Tuesday in November, 1950, Amendment No. 1 (Laws of Missouri, 1949, page 642) was voted on by the qualified voters of Missouri, and was adopted. This amendment repealed Section 11, Article X of the Constitution, and enacted in lieu thereof a new section under the same section number and relating to the same subject, which, in part, provides:

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

* * * * *

"For school districts formed of cities and towns - one dollar on the hundred dollars assessed valuation, except that in the City of St. Louis the annual rate shall not exceed eighty-nine cents on the hundred dollars assessed valuation;

"For all other school districts - sixty-five cents on the hundred dollars assessed valuation.

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided in school districts the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed one year, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; provided in school districts in cities of 75,000 inhabitants or over the rate of taxation as herein limited may be increased for school purposes so that the total levy shall

Honorable Hubert Wheeler

not exceed three times the limit herein specified and not to exceed two years, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; * * *

In reading the above constitutional provision it appears that there are now two methods by which a school tax levy may be increased above the constitutional limit. First, by a two-thirds vote of the qualified voters voting in favor thereof any amount of tax may be levied for a school purpose for a period not to exceed four years, and, second, by a majority vote of the qualified voters voting in favor thereof a tax may be levied for school taxes not to exceed three times the constitutional limit and for a period not to exceed one year, and in school districts in cities of 75,000 inhabitants or over for a period of two years.

You desire to know what information should be given to the qualified voters when a proposition to increase a school tax levy above the constitutional limit is submitted.

Section 165.080, R.S. Mo. 1949, as amended by Senate Bill No. 5, enacted by the 66th General Assembly with an emergency clause, and now in effect, was passed to implement the provisions of Section 11, Article X of the Constitution, as amended, and provides as follows:

"Whenever it shall become necessary, in the judgment of the board of directors or board of education of any school district in this state, to increase the annual rate of taxation, authorized by the constitution for district purposes without voter approval, or when a number of the qualified voters of the district equal to ten per cent or more of the number casting their votes for the directors of the school board at the last school election in said district shall petition the board, in writing, for an increase of said rate, such board shall determine the rate of taxation necessary to be levied in excess of said authorized rate, and the purpose or purposes for

Honorable Hubert Wheeler

which such increase is required, specifying separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which each proposed excess rate is to be effective, and shall submit to the qualified voters of the district, at the annual school meeting or election, or at a special meeting or election called and held for that purpose, at the usual place or places of holding elections for members of such board, whether the rate of taxation shall be increased as proposed by said board, due notice having been given as required by section 165.200; and if the necessary majority of the qualified voters voting thereon, as required by article X, section 11 of the constitution, shall favor the proposed increase for any purpose, the result of such vote, including the rate of taxation so voted in such district for each purpose, and the number of years said rate is to be effective, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, who shall, on receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all taxable property, real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants as provided by law."

Also, Section 165.487, R.S. Mo. 1949, as amended by Senate Bill No. 6, enacted by the 66th General Assembly with an emergency clause, and now in effect, was passed to implement Section 11, Article X of the Constitution, with reference to increasing the school tax levy in school districts in cities of 75,000 inhabitants or more.

Reading the above-quoted section, and Section 11, Article X of the Constitution, as hereinbefore quoted, it appears that the voters, when the proposition to increase the school tax levy above the constitutional limit is submitted, should be informed of the rate of the tax to be levied, the purpose or purposes for which such increase is required, specifying separately the rate of increase required for each purpose, if there is more than one purpose, and the number of years for which the tax is to be levied.

Honorable Hubert Wheeler

The period over which the tax levy is to extend should be included for it is an important factor which may determine the amount of vote required. For example, a tax levy for a particular school purpose in the amount of one dollar above the constitutional limit to be levied for only a period of one year would only require a majority vote, whereas the same tax rate to be levied for a period of three years would require a two-thirds vote.

The purpose, such as you have designated in the example used in your letter, must be included and, of course, it must definitely be a school purpose.

In the case of *Jacobos et al. v. Cauthorn et al.*, 293 Mo. 154, 238 S.W. 443, a proposition to increase the tax levy to one dollar and twenty-five cents, of which twenty-five cents thereof (and stated on the ballot) was voted for "building and repair fund." The court, in holding the tax levy excessive and invalid, said at S.W. 1.c. 445:

"The purpose for which said increase was voted was, not to erect a school building, but such increase, as stated in the notice and on the ballots, was for 'building and repair fund.' If the voters of the district had intended to erect a school building, then it would have been legitimate to vote an increase beyond the maximum fixed by the Constitution; but in such case, both under the Constitution and by statute, it would have been necessary for a submission of that question to the voters, and an authorization by two-thirds of the qualified voters present and voting on said proposition. * * *"

From the above case it is apparent that information to be given on the ballot when the proposition of an increased tax levy is submitted to the voters must include a proper school purpose for which the increased tax levy is required.

In *State ex rel. Thorp v. Phipps*, 148 Mo. 31, the information given to the voters voting on a tax levy for more than one school purpose was as follows, 1.c. 34:

"* * * to vote on a proposition to levy 100 cents on the \$100 assessed valuation of the district for school purposes; 85

Honorable Hubert Wheeler

cents of said 100 cents to be applied for
teachers' fund and 15 cents of said 100
cents to be applied for incidental fund.

* * *"

In view of the foregoing authorities and what we have heretofore said, we believe, in answer to your first question, that your sample proposition is correct and proper, except that it should include the period for which the rate of tax is to be levied. While we do not believe it is necessary to comply with the statutory and constitutional requirements, it would be well to also include on the ballot a statement of the amount of vote required for the adoption of the proposition. That is to say, a majority or two-thirds vote of the qualified voters voting in favor thereof, whichever the case may be.

In answer to your second question we conclude that the inclusion of more than one purpose, when the proposition is submitted as contained in your sample, would be proper, subject, however, to the exceptions as noted in answer to your first question.


CONCLUSION

It is therefore the opinion of this department that, when a proposition is submitted to the qualified voters of a school district to increase a tax levy for school purposes above the constitutional limit, the information to voters printed on the ballot should include the rate of the proposed tax levy, the school purpose or purposes for which it is required and the period for which the rate of tax is to be levied. As a suggestion, it would also be proper to include a statement of the amount of vote required for the adoption of the proposition.

Respectfully submitted,

APPROVED:

RICHARD F. THOMPSON
Assistant Attorney General


J. E. TAYLOR
Attorney General

RFT:ml

PUBLIC SCHOOLS: When there is an equal division of the Board of Education of a school district on any question pending before the Board the provisions of Sec. 165.320, RSMo 1949 are mandatory that the County Superintendent of Schools cast the deciding vote on such question; the provisions of said Sec. 165.320 are not directory; and, that the provisions of Sec. 163.090, RSMo 1949 do not exempt the said Superintendent from being a member of the Board to

April 2, 1951

cast the deciding vote upon the question of notifying teachers of their re-employment or the lack thereof.

Honorable Hubert Wheeler
Commissioner
Department of Education
Jefferson City, Missouri



Dear Commissioner Wheeler:

This will be the opinion requested by you from this office whether it is mandatory or directory, under the provisions of Section 165.320, RSMo 1949, for the County Superintendent of Schools to cast the deciding vote on any question pending before the Board of Education of a school district, when there is an equal division of the whole Board on such question, if requested by at least three members of the Board to do so. Your letter requesting our opinion reads as follows:

"Each year just before the annual school elections and before April 15 following the elections, Boards of Education give consideration to the requirement of notifying teachers of their re-employment or lack thereof. Boards of Education of six director districts sometime fail to reach decisions because of equal division of the board.

"Section 165.320, R.S. 1949, provides in part, that when there is an equal division of the whole board upon any question the County Superintendent of Schools, if requested by at least three members of the board, shall cast the deciding vote upon such question. Section 163.090, commonly known as the continuing contract law, provides in part, that the Board of Education shall notify each teacher in writing concerning his or her re-employment or lack

Honorable Hubert Wheeler

thereof on or before the 15th day of April each year. Failure on the part of the board to give such notice shall constitute re-employment.

"The Attorney General in his opinion of October 30, 1933, ruled that under Section 9329, Laws of Missouri 1931, page 333, that when there is an equal division of the board in hiring a teacher the County Superintendent of Schools has authority, when requested by at least three directors, to cast the deciding vote. This opinion uses the term 'may cast the deciding vote' instead of the mandatory statement of 'shall.' It has been suggested by some school officials that the continuing contract law, which was enacted after the Attorney General rendered his opinion October 30, 1933, possibly would act to modify Section 165.320, R.S. 1949. Under the continuing contract law a teacher is considered employed until such a time as the Board of Education shall, by a majority vote, notify the teacher of lack of re-employment.

"I shall be glad to have your advice and official opinion in regard to the following questions:

- "1. Is it mandatory, when requested, for the County Superintendent of Schools to cast the deciding vote upon any question when there is an equal division of the whole board whether it be a question of notifying a teacher of re-employment or lack thereof or any other question before the Board of Education?
- "2. If the law is not mandatory in requiring County Superintendents to cast a deciding vote, does it give him discretionary power to cast such vote when requested by at least three members of the Board of Education?
- "3. Does Section 163.090, R.S. 1949, known as the continuing contract law, exempt

Honorable Hubert Wheeler

the County Superintendent from serving as a member of the Board of Education for the purpose of casting the deciding vote when notifying teachers of their re-employment or lack thereof?"

Section 165.320, RSMo 1949, reads as follows:

"Within four days after the annual meeting, the board shall meet, the newly elected members, who shall be qualified by the taking of the oath of office prescribed by article VII, section 11, of the constitution of Missouri, and the board organized by the election of a president and vice-president, and the board shall, on or before the fifteenth day of July of each year, elect a secretary and a treasurer, who shall enter upon their respective duties on the fifteenth day of July; said secretary and treasurer may be or may not be members of the board. No compensation shall be granted to either the secretary or the treasurer until his report and settlement shall have been made and filed or published as the law directs. A majority of the board shall constitute a quorum for the transaction of business, but no contract shall be let, teacher employed, bill approved or warrant ordered unless a majority of the whole board shall vote therefor. When there is an equal division of the whole board upon any question, the county superintendent of schools, if requested by at least three members of the board, shall cast the deciding vote upon such question, and for the determination of such question shall be considered as a member of such board. The president and secretary, except as herein specified, shall perform the same duties and be subject to the same liabilities as the presidents and clerks of the school boards of other districts."

It will be observed that Section 165.320, supra, provides that no contract shall be let, teacher employed, bill approved or warrant ordered, unless a majority of the

Honorable Hubert Wheeler

whole Board shall vote therefor. The section further provides that if there is an equal division of the whole Board on any question, the County Superintendent of Schools, if requested by three members of the Board, shall cast the deciding vote on such question, and for the determination of such question shall be considered as a member of the Board. It will be apparent, we believe, from the express provisions of Section 165.320 that if the school board became equally divided on any question and the County Superintendent should refuse, upon the request of three members of the Board, to vote to break the tie on the question being considered, the interests of every person in the school district would be either directly or indirectly and adversely, affected. The Superintendent himself in such case would be subject to mandamus to compel him to perform the duty imposed upon him by the statute. To prevent such distress and injury the statute makes the County Superintendent a member of the Board, and commands him to cast the deciding vote in case of such tie in the Board. These express terms of the statute are mandatory we believe.

It is to be noted that the statute uses the word "shall". The Supreme Court of this State has held that, generally, in a statute, the word "may" is permissible or directory and that the word "shall" is mandatory. State ex inf. McKittrick vs. Wymore, 119 S.W. (2d) 941, 343 Mo. 98.

In Kansas City, Mo. vs. J.I. Case Threshing Mach. Co., 87 S.W. (2d) 195, the Court, in discussing statutory construction said l.c. 205:

"The words 'may, must, and shall' are constantly used interchangeably in statutes and without regard to their literal meaning; and in each case are to be given that effect which is necessary to carry out the intention of the Legislature as determined by ordinary rules of construction. * * * 'A mandatory construction will usually be given to the word "may" where public interests are concerned and the public or third persons have a claim de jure that the power conferred should be exercised or whenever something is directed to be done for the sake of justice or the public good.' * * * ."

Honorable Hubert Wheeler

There are times when words of a statute which are generally regarded as mandatory are given a directory meaning, but this rule is limited in its application. In 59 Am. Jur., Section 32, pages 53 and 54, the following is stated:

"There are cases in which words of a statute, which are generally regarded as mandatory, are nevertheless given a directory or permissive meaning, in order to give effect to the legislative intent. This is true of the word 'shall.' A legislative intention that the word 'shall' is to be construed as permissive, may appear from the spirit or purpose of the act, or from the connection in which it is used or the relation into which it is put with other parts of the same statute. The rule applies where no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or the individual, by giving it such construction. * * *." (Emphasis ours.)

And, at pages 55 and 56 of the same work it is said:

"A statutory provision is generally regarded as mandatory, where the power or duty to which it relates is for the security or protection of private rights. This is true of rights of third persons who have a claim de jure that the right should be exercised. An interpretation of a statute as directory is to be avoided where to put it in that category would result in serious impairment of the private interests that were intended to be protected by the statute. * * *."

It appears clear to us from the provisions of said Section 165.320 and the above cited authorities, answering your first question, that the provisions of said Section 165.320 are mandatory for the County Superintendent of Schools to cast the deciding vote upon any question when there is an equal division of the whole Board, if requested so to do by at least three members of the Board, on any question pending before the Board, including the employment, or re-employment of teachers, or the giving of notice to the

Honorable Hubert Wheeler

teachers of their re-employment or the lack thereof, under the terms of Section 163.090.

We will now consider your second question.

In holding, in answer to question one, that the terms of Section 165.320 are mandatory, it necessarily follows that the section could not be and is not directory, respecting the casting of the deciding vote by the County Superintendent in case of an equal division in the Board on any question, and that the section does not give him "discretionary" power to cast such vote or not to cast it. There is no authority in or out of Section 165.320 directing the Superintendent how he shall vote, but the section expressly requires that he shall cast such vote to break the tie where the Board is equally divided on any question, regardless of its subject. We now come to question three.

Section 163.090 commonly called the continuing contract law, must be considered and the provisions therein construed along with the provisions of Section 165.320 to harmonize and make effective the provisions of both sections. Section 165.320 constitutes the County Superintendent a member of the Board of Education of a school district for the purpose of casting, and such provisions direct him to cast, the deciding vote, if requested so to do by at least three members of the Board, when there is an equal division of the whole Board upon any question. We believe the Superintendent is by the statute made a member of the Board of Directors to cast the deciding vote upon such equal division of the whole Board on any question, including both the original employment of teachers under Sections 163.080 and 165.320, and their re-employment, and the notification to the teachers of their re-employment, or lack thereof, under Section 163.090.

CONCLUSION.

It is, therefore, the opinion of this Department, considering the above cited statutes and authorities that:

1) The provisions of Section 165.320 RSMo 1949 are mandatory for the County Superintendent of Schools to cast the deciding vote upon any question pending before the Board of Education when there is an equal division of the whole Board, if requested so to do by at least three members of the Board;

Honorable Hubert Wheeler

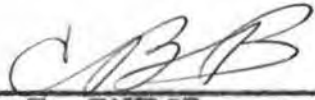
2) The terms and provisions of Section 165.320, RSMo 1949 are not directory and do not permit the County Superintendent of Schools to exercise any discretionary power to cast such deciding vote or not to cast it;

3) That Section 163.090, RSMo 1949, commonly known as the continuing contract law, does not by any of its provisions exempt the County Superintendent from serving as a member of the Board of Education for the purpose of casting the deciding vote when notifying teachers of their re-employment or lack thereof. The County Superintendent is constituted a member of the Board of Directors of a school district for the purpose of casting the deciding vote, where there is an equal division of the whole Board upon the request of three members of the Board that he do so, upon any question pending before the Board including the notifying of teachers of their re-employment or the lack thereof.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:



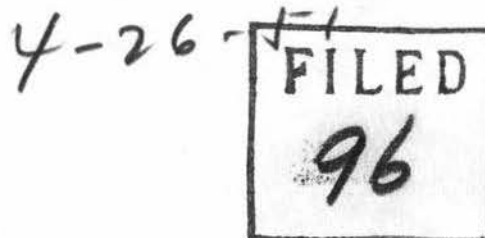
J. E. TAYLOR
Attorney General

GWC:ir

BOND REQUIRED OF :
COUNTY SUPERINTENDENT:

A county superintendent must give bond in
double the amount of his annual salary.

April 26, 1951



Honorable James J. Wheeler
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Mr. Wheeler:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"Our County Superintendent of Schools has recently been elected for a four year term. She says that there is a possibility she will not be able to complete her entire term, and wishes to know whether she is required to give bond in double the amount of her total salary for the four year term, or whether she may give bond in double the amount of her yearly salary, giving a new bond each year she serves.

"Section 167.030, Missouri Revised Statutes, 1949, provides in part, 'Before entering upon the duties of his office, the County Superintendent shall - - - give bond in double the amount of his salary, conditioned upon the faithful performance of his official duties - - '.

"I respectfully request your opinion as to whether the above section requires the County Superintendent of Schools to give bond in double the total amount of his four year salary, or whether a bond in double amount of his annual salary is acceptable."

Honorable James J. Wheeler

Section 167.030, RSMo 1949, requires the county superintendent to "give bond in double the amount of his salary" but does not undertake to define the meaning of the term "salary." However, the salaries of county superintendents, as provided in various sections of Chapter 167, RSMo 1949, are computed on an annual basis. It is evident that the salary mentioned in connection with the bond is the annual salary of the county superintendent as defined in Chapter 167.

This conclusion is upheld by the Supreme Court of Missouri in *Henderson v. Koenig*, 168 Mo. 356. On page 367 of that opinion the court said, "Salary is regarded as a per annum compensation." The Supreme Court again sustained this principle in *State ex rel. v. Speed*, 183 Mo. 186. In the course of that opinion, page 198, the court said:

"Though we do not at this time undertake to assert that these definitions of the word salary are so well established and inflexible that it would be improper to say that its use could have reference to nothing else than a yearly or per-annum compensation, we do think that when the word salary is found in a legislative act as applied to one's compensation for official work done or required, it is so generally understood to apply to the officer's per-annum allowance, when not otherwise qualified, that we are justified in attributing that meaning to the word."

The amount of the bond, therefore, must be double the annual salary, and this should be sufficient for the four-year term.

CONCLUSION

It is the opinion of this office that a county


Honorable James J. Wheeler

superintendent of public schools must give bond in
double the amount of his annual salary.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:



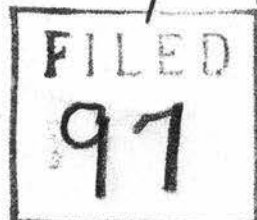
J. E. TAYLOR
Attorney General

BAT/feh

MOTOR VEHICLES: Criminal prosecution must be instituted within the jurisdiction in which the crime occurred. A person may be prosecuted for making false answers in an affidavit.

January 19, 1951

Honorable Robert P. C. Wilson, III
Prosecuting Attorney
Platte County
Platte City, Missouri



Dear Sir:

Your recent letter to the Attorney General has been assigned to me to answer.

You thus state your opinion request:

"Respectfully request the opinion of your department on the following problem:

A resident of Platte County, Missouri purchased a new car from a dealer in Leavenworth, Kansas, and gave back chattel mortgage to the dealer for unpaid portion of the purchase price. Purchaser received Bill of Sale showing on its face the lien of the dealer. Chattel mortgage was duly filed in Platte County. Purchaser sent Bill of Sale and Application for Missouri Certificate of Title to Commissioner of Motor Vehicles, together with required fee. The Application contained false statement by applicant that vehicle was subject to no lien. The Commissioner of Motor Vehicles issued Missouri Certificate of Title showing the vehicle clear of liens. Purchaser then went to Pennsylvania with the vehicle, and later sold same to an innocent purchaser, and assigned the Missouri Certificate of Title. It is indicated that the Kansas dealer knew mortgagor was in Pennsylvania with the car, since one or more payments was received by him from the mortgagor in Pennsylvania. I have advised the dealer and the finance company that the logical place to seek prosecution is the county in Pennsylvania where the sale took place. However, they are insisting on some sort of prosecution here, even if only for the false statement made in Application for Missouri Certificate of Title.

"I would appreciate your opinion on the above, and recommendations."

Mr. Wilson

Your request raises two questions. The first is whether the person in question in this instance could be prosecuted in Platte County, Missouri, for the sale of the motor vehicle in Pennsylvania. It seems obvious from your statement of facts that the crime of sale of mortgaged property occurred in the state of Pennsylvania. It is well established by the law that prosecution for a crime must be instituted in the jurisdiction in which the crime was committed which, in this instance, was clearly in Pennsylvania.

In this regard we direct attention to a general statement of the law on the matter of jurisdiction as found in 16 Corp. Jur. p. 162, Sec. 195, which states:

"Since a state has no jurisdiction to punish crimes committed beyond its limits, the courts of one state have no jurisdiction to enforce the criminal laws of another state or to punish crimes committed in another state."

We would further direct attention to the case of State vs. Gritzner, 134 Mo. 512, 1.c. 527:

"***And it has been ruled in this state, as well as elsewhere, that a person cannot be punished in this state where the offense was actually consummated in another state, even though some act constituting a part of the offense, or making the offense possible, was committed within this state. State v. Shaeffer, 89 Mo. 271; Works, Courts & Jurisdict, 470, and cases cited."

Therefore, prosecution for this sale must be instituted in the county in Pennsylvania in which the sale took place.

Your second question is whether the person involved herein can be prosecuted in Platte County, Missouri, for making a false answer in his application for title to the motor vehicle in question. Section 557.070, R.S. Mo., 1949, states:

"Every person who shall willfully, corruptly and falsely, before any officer authorized to administer oaths, under oath or affirmation, voluntarily make any false certificate, affidavit or statement of any nature, for any purpose, shall be deemed guilty of a misdemeanor, and shall upon conviction be punished by imprisonment in the county jail not less than six months, or by fine not less than five hundred dollars. (4276)"

Mr. Wilson

CONCLUSION

Criminal prosecution must be instituted within the jurisdiction in which the crime occurred.

A person may be prosecuted for making false answers in an affidavit.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

HPWab

COUNTY COURTS:
SHERIFFS:
COUNTY FARM BUREAU:

Amount of appropriation for support of county farm organization lies within the county court's discretion.
Fixing of deputy sheriff's salary lies within discretion of circuit judge; county court without authority in this regard.

2-3-51

January 31, 1951



Honorable Homer F. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Mr. Williams:

Your recent opinion request reads as follows:

"The County court of this county, a county of the 4th class, has heretofore been paying to the Farm Bureau of the county the sum of \$1000.00 annually for assistance in their operation which the court understands is mandatory under the Law. This year the Bureau turned in a much larger demand and the court does not feel that they are able to make any larger contribution than heretofore. Under the law can they be compelled to contribute more than \$1000.00 for the support of the Farm bureau of the county?"

"They are also interested in the matter of the salary of a Deputy Sheriff who has heretofore been paid the sum of \$50.00 per month by the county court and who actually gives very little time to the work of the office. Lately the new Circuit Judge made an order raising the salary of the deputy to \$100.00 per month. Does the county court have any discretion or do they have to pay this increase merely because ordered by the Circuit court. They don't feel that they should pay it out of the county funds under the circumstances."

I.

The first question presented in your opinion request is whether or not the county court of Bollinger County, a county

Mr. Homer F. Williams

of the fourth class, can be compelled to appropriate out of the general funds of the county a sum greater than \$1000.00 for the support of the county farm bureau, when said farm bureau in its budget requests a greater sum.

Section 262.550, RSMo 1949 reads as follows:

"For the purpose of promoting the public welfare and to aid in diffusing among the people of the state of Missouri useful and practical information on subjects relating to agriculture, home economics and rural life, and to encourage application of the same, the county court of each county of the state is hereby authorized and empowered and subject to the conditions herein specified shall appropriate out of the general funds of the county sums to be administered by a county farm organization under the conditions herein specified. (L. 1943 p. 319 Sec 2)"

The conditions referred to in the above statute are found in Section 262.580, RSMo 1949, which reads as follows:

"The board of directors of the county farm organization, in cooperation with the county court and the University of Missouri college of agriculture, shall prepare an annual financial budget covering the county's share of the cost of carrying on cooperative extension work in agriculture and home economics provided for in sections 262.550 to 262.620, which shall be filed with the county court of such county, and shall be included by said county court in class four of the budget of county expenditures for such year in counties budgeting the county expenditures by classes and in all other counties in the budget document, subject to the following restrictions:

"In counties of the first and second classes, the minimum appropriation shall be two thousand five hundred dollars. In counties of the third class, the minimum appropriation shall be two thousand dollars. In counties of the fourth

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class, the minimum appropriation shall be one thousand dollars; provided, that no county shall appropriate more than fifty cents per capita of the rural population as determined by the latest decennial federal census; provided further, that in any year in which the county farm organization approves a budget of lesser amount than is herein provided, then the lesser amount so approved shall be appropriated by the county court. (L. 1943 p. 319 Sec. 5, A.L. 1945 p. 100 Sec. 5)"
(Underscoring ours.)

Section 50.740, RSMo 1949 of the county budget law applying to counties of the fourth class, provides in part:

"It is hereby made the first duty of the county court at its regular February term to go over the estimates and revise and amend the same in such way as to promote efficiency and economy in county government. The court may alter or change any estimate as public interest may require and to balance the budget, first giving the person preparing supporting data an opportunity to be heard but the county court shall have no power to reduce the amounts required to be set aside for classes one and three below that provided for herein. After the county court shall have revised the estimate it shall be the duty of the clerk of said court forthwith to enter such revised estimate on the record of the said court and the court shall forthwith enter thereon its approval.
*****."

The county court's authority to alter or change any estimate presented to it to be included in the county budget as public interest may require is discussed in the case of *Bradford vs. Phelps County*, 210 S.W. (2d) 996, 357 Mo. 830. In this case the county court reduced the amount included by the prosecuting attorney in his estimate as stenographic expense. The court stated at l.c. 999, 1000 as follows:

Mr. Homer F. Williams

"County courts as the managerial agents of the county have the duty to so manage the county's fiscal affairs as to comply with Section 26, Article VI, Constitution of Missouri, 1945, providing (inter alia) limitations on indebtedness of local governments. Section 10910 as amended, Laws of Missouri, 1945, pp. 610, 611, of County Budget Law, supra, Mo.R.S.A. Sec. 10910. The County Budget Law makes it more expedient for the county court to perform its duty, that is, the County Budget Law provides 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.' Traub v. Buchanan County, 341 Mo. 727, 108 S.W. 2d 340,342. It is evident from the language of the County Budget Law that county courts in complying with the Law have duties of a discretionary nature in examining, revising and changing the estimates of the county's expenditures to the end of promoting the standard of 'efficiency and economy in county government,' Section 10917, supra. * * * * *

"As was the county court in the Daues case exercising discretion in reducing the compensation to the county treasurer to an amount which it deemed 'just and reasonable' (the standard stated in the statute involved in that case) so was the county court in the case at bar, in examining, revising and changing the estimates as required by the County Budget Law, exercising discretionary action in the public interest and with the purpose of promoting 'efficiency and economy in county government.'"

The county court, therefore, is authorized to appropriate out of the general funds of the county a sum to be administered by a county farm organization. Their authority in this regard, however, is subject to limitations. In counties of the fourth class, absent approval by the county farm organization of a

Mr. Homer F. Williams

budget of a lesser amount, a minimum appropriation of \$1000.00 shall be made. There is also a maximum amount which can be appropriated for this purpose. In those instances where a budget is submitted by the county farm bureau amounting to a sum greater than the minimum required by statute, the county court has the authority as conferred by Section 50.740, supra, to alter or change any estimate as public interest may require and to balance the budget. The exercise of this authority is a matter entirely discretionary with the county court. Therefore, the county court can in no way be compelled to contribute a sum greater than \$1000.00 for support of the county's farm bureau.

It is further stated in *Bradford vs. Phelps County*, supra, at l.c. 1001 that:

"We have noticed the Legislature has seen fit to delegate to the county court discretionary powers and duties under Section 10917 of the County Budget Law--the county court can be said to be 'the agency most familiar with the fiscal affairs and financial condition of the county' (State ex rel. Dietrich v. Daues, supra; State ex rel. Dwyer v. Nolte, supra), as well as the agency most likely to soundly budget estimated receipts and expenditures to the end of efficiency and economy in county government. It seems the county court's exercise of its discretion in the performance of its statutory and discretionary duty should not be interfered with, vacated or set aside, except in a case where it is clear the county court in acting abused or arbitrarily exercised its discretion (or, if such were the charge, acted fraudulently or corruptly)."

We therefore see that as long as the county court exercises its discretion in the matter of the instant appropriation, its action cannot be controlled in any way. Only when there is an abuse of this discretion through fraudulent or arbitrary exercise of same can the county court's action in this regard be interfered with.

Mr. Homer F. Williams

II.

The answer to your second question is supplied by Section 57.250, RSMo 1949, which reads as follows:

"The sheriff in counties of the third and fourth classes shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the judge of the circuit court, as such judge shall deem necessary for the prompt and proper discharge of his duties relative to the enforcement of the criminal law of this state. The judge of the circuit court, in his order permitting the sheriff to appoint deputies or assistants, shall fix the compensation of such deputies or assistants. The circuit judge shall annually, and oftener if necessary, review his order fixing the number and compensation of the deputies and assistants and in setting such number and compensation shall have due regard for the financial condition of the county. Each such order shall be entered of record and a certified copy thereof shall be filed in the office of the county clerk. The sheriff may at any time discharge any deputy or assistant and may regulate the time of his or her employment. (L. 1945 p. 1547 Sec. 2, L. 1945 p. 1562 Sec. 2, A. 1949 H. B. 2015)"

The county court has no statutory authority whatsoever with regard to the fixing of the salary of the deputy sheriff. Section 57.250, supra, makes it the duty and authorizes the judge of the circuit court, and he alone, to fix the compensation of deputy sheriffs.

In State ex rel. vs. Daues, 287 S.W. 430, 315 Mo. 701, the statutory authority of the county court to "allow the treasurer for his services under this article such compensation as may be deemed just and reasonable" was in question. Regarding this authority, the court stated at l.c. 431:

Mr. Homer F. Williams

"It requires no citation of authority to show that the power to prescribe a salary as an incident to a public office is purely legislative in character. That power, as respects the office of county treasurer, the Legislature has delegated to the county court, the agency most familiar with the fiscal affairs and financial condition of the county, as well as the services required to be performed by the treasurer--which may vary in different counties and at different times in the same county. The only limitation upon the power is that the compensation allowed thereunder be such as may be deemed just and reasonable. What is just and reasonable in a given case is committed to the discretion of the county court and to it only. * * * * *

We, therefore, see that the exercise by the judge of the circuit court of his authority to fix the compensation of deputy sheriffs pursuant to Section 57.250, supra, is a matter lying entirely within his discretion. The county court is without any authority in this regard. Only when this discretion of the circuit judge is abused by arbitrary or fraudulent exercise of same may his action be interfered with.

CONCLUSION

It is therefore the opinion of this department that:

1. The county court of counties of the fourth class cannot be compelled to contribute more than \$1000.00 for the support of the county farm organization when the budget filed with the county court by said county farm organization amounts to a sum greater than \$1000.00 as their appropriation therefor is a matter lying entirely within their discretion. Only when there is an abuse of this discretion through fraudulent or arbitrary exercise of same can the county court's action in this regard be interfered with.

Mr. Homer F. Williams

2. The county court is without authority with regard to the fixing of the compensation of the deputy sheriffs as this is a matter lying entirely within the discretion of the judges of the circuit court. Here again only an abuse of this discretion will warrant interference with his action thereon.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED

J.E.J.

J. E. TAYLOR
Attorney General

RHV:ba

Board of Trustees of County Library District authorized under Section 182.070 to
COUNTY LIBRARY DISTRICT : purchase real property for use of the
library with funds collected from the tax
LIBRARY DISTRICT : levied under Section 182.010.

June 21, 1951.

Hon. Homer F. Williams,
Prosecuting Attorney
Bollinger County,
Marble Hill, Missouri.



Dear Sir:

This will acknowledge receipt of your letter requesting this office to furnish you an opinion on a question which you stated as follows:

"Has the Board of Trustees of a county library district under Section 182.070 the power to purchase a building for a library with funds derived from mill tax voted under Section 182.010, when county-wide library service is being provided?"

Authorization for the organization of County Library districts is found in Chapter 182, Sections 182.010 to 182.130, RSMo 1949. Section 182.010 provides in part that the voters within the proposed library district may vote for or against the levy of a tax for the establishment and maintenance of a county library. Said section reads as follows:

"Whenever one hundred taxpaying citizens of any county, outside of the territory of all cities and towns now or hereafter maintaining, at least in part by taxation, a public library, shall in writing petition the county court, asking that a county library district of the county, outside of the territory of all such aforesaid cities and towns, be established and be known as _____ county library district,' and asking that an annual tax be levied for the purpose herein specified, and shall specify in their petition a rate of taxation not to exceed two mills on the dollar; then the county court shall, if it finds said petition was signed by the requisite number of qualified petitioners, enter of record a brief recital of such petition, including a description of such proposed county library district, and of its finding aforesaid; and shall order that the propositions of such petition be submitted to the voters of such proposed district at the next annual election to be held the first Tuesday in April; and that the clerk of the county court shall cause to be published the proposition or propositions of such petition; and

said county clerk shall cause said proposition or propositions to be published in like manner, as near as may be, with the publication of 'the nominations to office,' as provided in section 120.580, RSMo 1949. Such order of court and such notice shall specify the name of the county and the rate of taxation mentioned in said petition, and such county clerk shall make and file in his office, return of service of such notice; and every voter within such proposed county library district may, in his proper district vote

'For establishing _____ county library district,'
or

'Against establishing _____ county library district,'
and may vote

'For _____ mills tax for a free county library,'
or

'Against _____ mills tax for a free county library;' provided, that in case the boundary limits of any city or town herein mentioned are not the same with the school district of such city or town, and such school district embraces territory outside the boundary limits of such city or town, then all voters, otherwise qualified and residing in such school district and outside the limits of such city or town, shall be eligible to vote on any proposition or matter of such library district, submitted to the voters at such election, and may cast a vote thereon, at the nearest and most convenient district schoolhouse within said county library district."

Section 182.020, RSMo 1949, provides in part for the establishment of a "county library fund" in the following terms.

"And if, from returns of such election, which shall be certified to the county court, the majority of all the votes cast on such propositions at such election shall be

'For establishing _____ county library district,'
and for the tax for a free county library, the county court shall enter of record a brief recital of such returns and that there has been established

' _____ county library district,'
and thereafter such

' _____ county library district'
shall be considered and held to be established, shall be a body corporate, and known as such; and the tax specified in such notice shall, subject to provisions herein below of this section, be levied and collected, from year to year, in like manner with other taxes in the rural school districts of said county. The proceeds of such levy, together with all interest accruing on same, with library fines, accruing on same, with library fines, collections, bequests and donations in money shall be deposited in the treasury of the county and be known as

the 'county library fund,' and be kept separate and apart from other moneys of such county, and disbursed by the county treasurer only upon the proper authenticated vouchers of the county library board herein mentioned; provided, that such taxes shall cease, in case the regular voters of any such district shall so determine by a majority vote at any annual election held therein, after petition, order of court, and notice of such election and of the purpose thereof, first having been made, filed and given, as in the case of establishing such county library district."

Section 182.070 delineates a part of the powers of the library district to be exercised through the board of trustees. Said section reads as follows:

"Said '_____ county library district' as such body corporate, by and through said county library board, shall have power to sue and be sued, to complain and defend, and to make and use a common seal, to purchase or lease grounds, to lease, occupy or to erect an appropriate building or buildings for the use of said county library and branches thereof, and to sell and convey real estate and personal property for and on behalf of the county library and branches thereof, to receive gifts of real and personal property for the use and benefit of such county library and branch libraries thereof, the same when accepted to be held and controlled by such board, according to the terms of the deed, gift, devise or bequest of such property." (Emphasis ours.)

It appears from this section that the legislature authorized the Board of Trustees of a county library district to purchase a building and grounds to be used for a library with the tax the voters may have voted to levy under section 182.010.

In addition to the levy voted upon under section 182.010, section 182.100 provides for an election to determine whether an additional tax should be levied in the library district for the erection of a library building. Said section reads as follows:

"Whenever, in any county library district, which has decided or shall hereafter decide to establish and maintain a free county library under the provisions of sections 182.010 to 182.130 the county library board shall by written resolution entered of record, deem it necessary that a free county library building should be erected in such county and one hundred taxpaying citizens of any such county library district, shall in writing petition the county court asking that an annual tax be levied at and as an increased rate of taxation for such library building and shall specify in their petition a rate of taxation not to exceed one and one-half mills on the dollar annually, and not

to be levied for more than five years on all taxable property in such county library district; then the county court shall, if it finds said petition was signed by the requisite number of qualified petitioners, enter of record a brief recital of such petition, and of its finding aforesaid, and shall order that the proposition of such petition be submitted to the voters of such county library district at the next annual election to be held on the first Tuesday in April; and that the clerk of the county court shall cause to be published the proposition of such petition and said county clerk shall cause said proposition to be published in like manner, as near as may be, with the publication of 'the nominations to office,' as provided in section 120.580, RSMo 1949. Such order of court and such notice shall specify the rate of taxation mentioned in said petition; and the county clerk shall make and file in his office return of service of such notice; and every voter within such county library district may, in his proper district, as in section 182.010 provided, vote

'For _____ mills tax for erection of free county library building,'

or

'Against _____ mills tax for erection of free county library building,'

and if the majority of the qualified voters of such county library district voting on said proposition at such election shall vote

'For _____ mills tax for erection of free county library building,'

the tax specified in such notice shall be levied and collected in like manner with other taxes of said county library district, and shall be known as 'The County Library Building Fund,' and shall be subject to the exclusive control of said county library board and be drawn upon by the proper officers in such county upon the properly authenticated vouchers of said board, and be used for the erection of the library building. The fund hereby provided for the erection of a free county library building in such county shall be in addition to the tax levied for the establishment and maintenance of such county library." (Emphasis ours.)

You will particularly note that this section provides that the "County Library Building Fund" shall be in addition to the tax levied for the establishment and maintenance of a county library. No attempt is made in the creation of this additional fund to limit the use of the fund created under the provisions of section 182.010.

Hon. Homer F. Williams.

The fund created by a tax voted under said section 182.010 may be used to purchase a building and grounds for the use of the county library whether or not any additional tax is levied under section 182.100 creating the "County Library Building Fund."

You express the idea in your letter that some type of county-wide library service is being provided in the county now, but you give no indication of the type service this is, i.e., whether it is a rental library operated by individuals, or whether the service is rendered through contract with the county and some established library such as is provided for under section 182.080, RSMo 1949. We presume, however, that the fact that some other type of library service is being rendered in the county would not remove from the County Library Board the discretion to use funds collected under section 182.010 for the purchase of grounds and buildings to be used in the operation of a County Library District.


CONCLUSION

The Board of Trustees of a County Library District is authorized under section 182.070 to purchase grounds and buildings for the use of the county library with funds derived from the tax levied under section 182.010, RSMo 1949.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney-General

JEM/ld

CHIROPRACTORS: Doctors of Chiropractic are not physicians in the sense referred to in Section 202.150, R. S. Mo. 1949.

October 15, 1951

10-25-51

FILED

97

Hon. Homer F. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Mr. Williams:

Your letter of recent date requesting an opinion of this department reads as follows:

"I would appreciate an opinion on the following:

"Section 202.150 R.S.Mo. 1949 reads in part as follows:

"'At least one of the witnesses examined shall be a reputable physician.'"

"Is a chiropractor considered a reputable physician within the meaning of that section?"

Section 331.010, R. S. Mo. 1949 reads as follows:

"The practice of chiropractic is hereby defined to be the science and art of palpating and adjusting by hand the movable articulations of the human spinal column, for the correction of the cause of abnormalities and deformities of the body. It shall not include the use of operative surgery, obstetrics, osteopathy, nor the administration or prescribing of any drug or medicine. The practice of chiropractic is hereby declared not to be the practice of medicine and surgery or osteopathy within the meaning of chapters 334 or 337, RSMo 1949, and not subject to the provisions of said chapters."

Hon. Homer F. Williams

In the case of S. H. Kress & Co. vs. Sharp, a case wherein a patient with a broken hip had been treated by a chiropractor, which injury was sustained in a fall, resulting in a damage suit, and the plaintiff had employed a chiropractor to take care of the injury, the Supreme Court of the State of Mississippi, in 126 So. 650, l.c. 653, said that:

" * * * Chiropractors are not physicians, (cases cited) and they are not therefore within the privilege of physicians under Section 7455 Hem. 1927 Code. * * *"

In the case of Corsten v. State Industrial Commission, 240 N.W. 834, the court said, l.c. 835, 836:

"Under chapter 147 a chiropractor is not a physician, even though he does treat the sick and treat diseases and diagnose. Under that chapter physicians are licensed to practice medicine, section 147.17; while chiropractors receive a 'certificate of registration in the basic sciences and a license to practice chiropractic,' section 147.23. But 'no certificate of registration shall be considered equivalent to a license (to practice medicine).' Section 147.17. And 'no person not possessing a license to practice medicine and surgery, osteopathy, or osteopathy and surgery, under section 147.17, shall use or assume the title "doctor" or append to his name the words or letters "doctor", "Dr.", "specialist," "M.D.," or "D. O."' Section 147.14(3). Thus these names and letters may be applied only to those who are licensed as physicians to practice medicine and surgery, and conversely those to whom the names and letters may not be applied are not physicians. It is held in Isaacson v. Wisconsin Casualty Ass'n, 187 Wis. 25, 203 N.W. 918, that a chiropractor is not a 'legally qualified physician' under the terms of an accident insurance policy, even though he does treat the sick in a restricted way. The conclusion seems to be based upon the fact that under the statute as it then stood chiropractors might 'practice their profession' without procuring a license, and the term 'legally qualified physician' in the policy meant a 'licensed

Hon. Homer F. Williams

physician,' but it seems plain that it might as well, and perhaps more reasonably, have been held that a chiropractor was not a physician at all. The definition of physician first given in Bouvier's Law Dictionary (2 Rawle's 3d Ed. 2586) is: 'A person who has received the degree of doctor of medicine.' One of the definitions in Webster's Dictionary is 'a doctor of medicine.' In line with these definitions, and chapter 147, we are of opinion that the word 'physician' as used in the Compensation Act does not include a chiropractor."

In the case of Reichert v. People's State Trust & Savings Bank, 255 N.W. 299, l.c. 300, a case involving the liability of an insurance policy, the Supreme Court of the State of Michigan said:

"Cancellation is sought on the ground that the insurance did not become effective because, in violation of the application above quoted, the applicant consulted and was treated by a physician after his medical examination and prior to delivery of the policy. As against this contention, the defendant asserts that under the law of Michigan a chiropractor is not a physician, and hence treatment of the insured by a chiropractor did not prevent the policy becoming effective upon delivery. See Erdman v. Great Northern Life Ins. Co., 253 Mich. 579, 235 N.W. 260, wherein it is held that a chiropractor is not a licensed physician or surgeon. Plaintiff contends that, notwithstanding the holding just above noted, a chiropractor should be held to be a 'physician' within the meaning of the quoted portion of the application for insurance in the instant case. The application blank, like the insurance policy, was prepared by the insurance company; and hence it should be read in terms most favorable to the insured. So read, the word 'physician' must be held to mean a legally licensed physician or doctor of medicine. Such is the meaning that a reading of the application would convey to the ordinary lay mind. Under our holding

Hon. Homer F. Williams

in Erdman v. Great Northern Life Insurance Co., supra, a chiropractor is not a licensed physician. It follows that, notwithstanding the insured consulted a chiropractor and was treated by him as above noted, the insurance became effective upon delivery of the policy."

Webster's New International Dictionary defines "Physician" as "a person skilled in physic and the art of healing; one duly authorized to treat diseased, esp. by medicine; a doctor of medicine: --often distinguished from a surgeon."

Section 331.010, supra, in defining chiropractic, does not in any sense refer to the same as an art of healing, but rather definitely says: " * * * art of palpating and adjusting by hand the movable articulations of the human spinal column for the correction of the cause of abnormalities and deformities of the body * * *."

The practice of chiropractic is by statute declared not to be the practice of medicine and does not make reference in any manner to the practice of treating diseases.

CONCLUSION

Therefore, it is the opinion of this department that a doctor of chiropractor does not come within the class of witnesses referred to in Section 202.150, R.S. Mo. 1949, as physicians.

Respectfully submitted,

GORDON P. WEIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GPW:A

CLAIMS AGAINST THE STATE:

The State is not liable in damages for the wrongful acts of inmates of a State maintained training school for the care and treatment of feeble-minded and epileptic patients.

June 18, 1951

6-20-51

Honorable Charles A. Witte
Missouri State Senate
Jefferson City, Missouri



Dear Senator Witte:

This will be in reply to your request for an opinion from this department whether the Legislature is authorized to include in an appropriation bill the reimbursement out of public funds of a person whose property is said to have been destroyed by a fire occasioned by inmates of Bellefontaine Farms, premises used by the St. Louis Training School, a public institution, maintained by the State for feeble-minded and epileptic persons. Your letter requesting the opinion reads as follows:

"A constituent of mine, Mr. Louis Arno, has asked me to present to the House Appropriations Committee a claim for damages in the sum of \$2486.00, arising out of a fire at his place on Bellefontaine Road on August 14, 1950. Two inmates of Bellefontaine Farms have admitted that they started the fire. Mr. Columbo, Chairman of the Committee, was doubtful about the state's liability in such a case and asked that I request an opinion from your office in that connection.

"I would greatly appreciate your advising me on the state's position in this matter at your early convenience, so that if it be a legitimate claim against the state it may be incorporated in the omnibus bill which is in the course of preparation."

Honorable Charles A. Witte

The St. Louis Training School for the care and treatment of feeble-minded and epileptic persons was created and exists by virtue of the provisions of Section 202.590, RSMo 1949.

The object of the Missouri State School is defined in Section 202.600, RSMo 1949, to be to secure the humane, curative, scientific and economical treatment and care of the feeble-minded and epileptics, exclusive of dangerous epileptics. This section further provides for acquiring a tract of fertile and productive land with such healthful and convenient environments as will accomplish the objects of the school. Bellefontaine Farms, it is said, is so used.

Section 202.610 of our 1949 Revision provides that there shall be received and gratuitously supported in the Missouri state schools (which includes this school) feeble-minded and epileptics residing in the State, who, if of age, are unable, or if under age, whose parents or guardians are unable to provide for their support therein, and who shall be designated as state patients.

Your letter states that a resident property owner of your Senatorial District on August 14, 1950, suffered loss and damage to his property on Bellefontaine Road in the alleged sum of \$2486.00 by a fire which destroyed certain of his property and which fire, the letter recites, was of incendiary origin, the setting of which, the letter states, has been admitted by two inmates of said Bellefontaine Farms.

The specific question you submit in your request for this opinion is, whether the State is liable in such a case for the acts of inmates of a public institution, such as the Missouri State School, and if the State is liable may an appropriation for the reimbursement of the owner of such property for his loss and damage, be included as a legal claim against the State in the omnibus bill pending before the present Legislature of this State.

Several legal principles are here involved in the question of whether the instant effort to obtain this appropriation is a legitimate or legal claim:

- 1) Whether the claim does constitute a cause in favor of the claimant and against the State which could be determined at law by judicial process;

Honorable Charles A. Witte

2) Whether the appropriation, if made, would be in violation of the first clause of Section 38 (a), Article III of our present Constitution which prohibits the granting of public money to a private person, and,

3) Whether inclusion of such claim in the omnibus bill in the form of an appropriation would violate Section 23 of Article III of the present Constitution, which reads as follows:

"No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated."

The Appellate Courts of this State have not defined a "legal claim" against the State, so far as we have been able to learn.

59 C.J. page 282, Section 429, defines a "legal claim" as follows:

"* * * A 'legal claim' against the state is one recognized or authorized by the law of the state, or which might be enforced at law if the state were a private corporation. Within the meaning of statutory or constitutional provisions relating to their presentation and allowance, the term 'claims against the state' refers to a legal claim, a claim as of right, and generally it is further limited to claims arising out of contract, where the relation of debtor and creditor exists. * * *."

The Supreme Court of the State of Montana gave a very clear definition of what constitutes a "legal claim" against a State in the case of Mills vs. Stewart, 247 Pac. Rep. 332. That Court, l.c. 335, defined the phrase "legal claim" as follows:

"* * * If the term 'legal claim' as applied to a state has any meaning, it must refer

Honorable Charles A. Witte

to a claim which is recognized or authorized by the law of the state, or one which might be enforced in an action at law if the state were a private corporation. * * * ."

It is, we believe, undisputed in every jurisdiction, that the State may not be sued without its consent. 59 C.J. 300, 301, states the following on this rule:

"A state, by reason of its sovereignty, is immune from suit and it cannot be sued without its consent, in its own courts, the courts of a sister state, or, by an individual, in the federal courts. * * * ."

Our Supreme Court in the case of Merchants Exchange vs. Knott, et al., Railroad and Warehouse Commissioners, 212 Mo. 616, l.c. 647, in harmony with the last quoted text from Corpus Juris, said:

"* * * That the sovereign State may not be sued is a truism. * * * ."

In holding that neither the State nor its public hospitals as governmental agencies of the State may be held liable for the negligence or misconduct of its employees, 30 C.J. 465, Section 14 B, states the following text:

"In the absence of statutory provision to the contrary a hospital created and existing for purely governmental purposes and under the exclusive ownership and control of the state is not liable for injuries to a patient caused by the negligence or misconduct of its employees, or for personal injuries sustained by an employee, although a statute may declare it to be a corporation which may sue and be sued. Nor is the state liable."

For like reasons and under like authority which uphold the State's non-liability for the negligence of its officers or agents, the State is also held not liable for the torts of such officers or agents. 59 C.J. 194, on this principle states the following:

Honorable Charles A. Witte

"A state is not liable for the torts of its officers or agents in the discharge of their official duties unless it has voluntarily assumed such liability and consented to be so liable, * * *."

The above quoted text of Corpus Juris, footnote 34, cites the Missouri case of Cassidy vs. City of St. Joseph, 247 Mo. 147. In harmony with such text, our Supreme Court, in that case, l.c. 205, 206, upholding the bar against liability of the State or its agencies in an action for damages for the non-feasance, misfeasance or malfeasance of its agents or officers in the performance of their governmental acts held:

"Neither the State nor those quasi-corporations consisting of political subdivisions which, like counties and townships, are formed for the sole purpose of exercising purely governmental powers, are, in the absence of some express statute to that effect, liable in an action for damages either for the non-exercise of such powers, or for their improper exercise, by those charged with their execution. This applies alike to the acts of all persons exercising these governmental functions, whether they be public officers whose duties are directly imposed by statute, or employees whose duties are imposed by officers and agents having general authority to do so. * * *."

In 1941, in the case of Todd vs. Curators of the University of Missouri, 347 Mo. 460, our Supreme Court reaffirmed this doctrine of the non-liability of the State or its governmental agencies for damages when acting in a governmental capacity. The Court in restating the rule, l.c. 464, 465, held:

"Our Constitution recognizes higher education as a governmental function and vests the government of the State University in a Board of Curators under the control of the State. (Mo. Const., Art. XI, Sec. 5.)

"In *Head v. The Curators of the University of Missouri*, 47 Mo. 220, on page 224, this court said: 'The university is clearly a public institution, and not a private corporation. . . . The State established an institution of its own, and provided for its control and government, through its own agents and appointees.' Again, on page 225; '... By establishing the university the State created an agency of its own, through which it proposed to accomplish certain educational objects. In fine, it created a public corporation for educational purposes--a State University.'

"In the absence of express statutory provision, a public corporation or quasi corporation, performing governmental functions, is not liable in a suit for negligence. (*Cochran v. Wilson*, 287 Mo. 210, 229 S.W. 1050; *Dick v. Board of Education (Mo.)*, 238 S.W. 1073; *Krueger v. Board of Education*, 310 Mo. 239, 274 S.W. 811, 40 A.L.R. 1086; *Robinson v. Washtenaw*, Circuit Judge, 228 Mich. 225, 199 N.W. 618; *Reardon v. St. Louis County*, 36 Mo. 555; *Clark v. Adair County*, 79 Mo. 536; *Moxley v. Pike County*, 276 Mo. 449, 208 S.W. 246; *Lamar v. Bolivar Special Road District (Mo.)*, 201 S.W. 890; *State ex rel. v. Allen*, 298 Mo. 448, 250 S.W. 905; *Zell v. St. Louis County*, 343 Mo. 1031, 124 S.W. (2d) 1168; *Bush v. State Highway Commission*, 329 Mo. 843, 46 S.W. (2d) 854; *Broyles v. State Highway Commission (Mo. App.)*, 48 S.W. (2d) 78; *Arnold v. Worth County Drainage District*, 209 Mo. App. 220, 234 S.W. 349; *D'Arcourt v. Little River Drainage Dist.*, 212 Mo. App. 610, 245 S.W. 394.)

"A statutory provision that such a public corporation 'may sue and be sued' does not authorize a suit against it for negligence. '... But the waiver by the State for itself or its officers or agents of immunity from an action is one thing. Waiver of immunity from liability for the torts of the

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officers or agents of the State is quite another thing.' (Bush v. Highway Commission, 329 Mo. 843, 1.c. 849, 46 S.W. (2d) 854. See also Hill-Behan Lumber Co. v. State Highway Commission, 347 Mo. 671, 148 S.W. (2d) 499, and cases cited, supra.)

"The cases heretofore cited are mainly based upon the principle that a public corporation, performing governmental functions, is an agency or arm of the State and entitled to the same immunity as the State itself, in the absence of express statutory provision to the contrary. * * * ."

Our Kansas City Court of Appeals in the case of Whittaker vs. Hospital, 137 Mo. App. Rep. 116, had the question before it for decision whether the hospital was liable for an injury to an employee caused by the negligence of the institution. In holding that a governmental agency, such as a charitable hospital, could not be held to respond in damages for the negligence of its employees or trustees, the Court, 1.c. 120, said:

"* * * Two rules of law, both founded on motives of public policy, come into conflict here; the rule of respondeat superior (or if not technically that, one akin to it) and the rule exempting charitable funds from executions for damages on account of the misconduct of trustees and servants. As both rules rest on the same foundation of public policy, the question is whether, on the facts in hand, the public interest will best be subserved by applying the doctrine of respondeat superior to the charity, or the doctrine of immunity; and we decided this cause for respondent because, in our opinion, it will be more useful on the whole not to allow charitable funds to be diverted to pay damages in such a case; and, moreover, the weight of authority is in favor of this view, as expressed not only in cases where the parties seeking damages were patients in the institution, but where they were not. * * * ."

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The case of Zummo vs. Kansas City, 285 Mo. 222, was before the Supreme Court in a suit to recover damages against the city for the death of a patient caused by an insane patient in the city hospital of Kansas City, Missouri. The trial court sustained a demurrer to the plaintiff's petition on the ground that the petition did not state a cause of action and that, therefore, the city was not liable. The Supreme Court upon an appeal, affirming the judgment of the Circuit Court, and denying recovery, l.c. 231, referring to the hospital, held:

"* * * In these respects it is the arm of the State government, including the use of its legislative powers so far as consistent with the Constitution and laws of the State. This being the case the same exemption enjoyed by the State itself from liability for damages inflicted by its officers and agents in the performance of similar duties attaches to the defendant city. For these purposes it is not merely an agency of the State but is, under the Constitution which is the authority for its existence, an integral part of the State government, and partakes of its immunities as well as its duties."

Considering the above authorities it appears to be clear that, under the facts revealed in this case, the loss suffered by the owner of the property destroyed by fire occasioned by the two inmates of Bellefontaine Farms at St. Louis, Missouri, does not, considering the first legal principle named herein, constitute a "legal" or "legitimate" claim against the State. It is apparent that under these authorities the claim made to the Legislature for an appropriation could not be enforced in an action at law against the State and that since there is no statute in force in this State giving express authority to sue the State or its governmental agencies in such cases, an appropriation act if enacted by the Legislature would constitute a grant or gift of public money to an individual. This would be in violation of Section 38 (a), Article III of the present Constitution of this State which, in part, reads as follows:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, * * * ."

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In support of this constitutional prohibition in the case of State ex rel. vs. Board of Trustees, 184 S.W. 929, the Kansas City Court of Appeals, l.c. 933, said:

"* * * It is a fundamental principle of the law of this state that public money shall not be paid to a private individual for something wholly disassociated from the interests of the public itself. * * *."

The first clause of Section 38 (a) of Article III of our present Constitution is a rephrasing of parts of Sections 45 and 46 of Article IV of the Constitution of this State, 1875, particularly Section 46. The Supreme Court of Missouri discussed and construed said Section 46 in Kavanaugh, et al. vs. Gordon, State Auditor, 244 Mo. 685. The case was a proceeding in injunction by Kavanaugh and others as taxpayers against the State Auditor to enjoin the auditing of the accounts and drawing warrants in favor of one Nolen, named a "special agent" of the State and Missouri Waterways Commission and to prevent the payment to Nolen of \$7000.00 for alleged salary and expenses out of a total appropriation of \$17,000.00 made to the said Commission. The case was based upon the grounds that Nolen was not a public officer, was performing no governmental duties for the State in his pretended employment, and that the payment to him, if made, would constitute a gift and grant of public money to an individual, and that that part of the appropriation was unconstitutional and void. The Supreme Court so held and in its opinion, l.c. 721, 722, said:

"* * * We will assume, as already held, that Nolen was not an officer, filling a public office. Attending to the language of the challenged part of the act, it is apparent he was not dealt with as a creditor of the State with a claim due to be paid by an appropriation in a bill. * * * * * Minus official orbit, he is a wandering star in Missouri governmental heavens. In that view of it, we can come to no conclusion except that he is dealt with as an individual. Hence the provision that \$7000 of the \$17,000 appropriated to the commission must be paid to him on his own vouchers, amounted in reason and law to an out-and-out gift to him as an individual of \$7000 of the

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State's money in violation of Sec. 46, Art.
4, of the Constitution, supra. * * *."

There are other decisions by our Supreme Court to the same effect in the Court's construction of the terms of Section 46 of Article IV of the 1875 Constitution of this State, but we believe the above cited authorities will suffice to clearly demonstrate that under the terms of said Section 38 (a), Article III of the present Constitution, an appropriation to pay the owner for the alleged loss of his property by reason of the alleged acts of the inmates of Bellefontaine Farms, a State institution, would, considering the second legal principle here being discussed, be in conflict with said Section 38 (a) by granting public money to a private person.

We now come to the consideration of the third principle of law involved in the determination of whether the proposed appropriation in this case is legal. Section 23 of Article III, supra, of our Constitution, provides that no Bill shall contain more than one subject. The section prescribes that that subject shall be clearly expressed in the title of the Bill, except Bills enacted under the third exception to Section 37 of Article III. Section 37, Article III, deals with the question of contracts creating a debt or obligation upon the State through the issuance of bonds.

Our Supreme Court in the case of State ex rel. vs. Smith, 175 S.W. (2d) 831, gave its construction of Sections 48 and 44 of the 1875 Constitution which sections were in much the same language, although abbreviated, as is now said Section 37 of Article III of the present Constitution. The Court especially construing said Section 44 of said Article IV, 1.c. 833 (2) in the latter sentence thereof said:

"* * * This section is a restriction on the power of the legislature to raise revenue through the issuance of bonds and otherwise."

The question here is not related to the issuance of bonds or the authority to be put in operation, or the restrictions to be observed, incident to their issuance, as provided in said Section 37, including the exception provided in exception (3) thereof. We may then safely take the position,

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we believe, that the first clause of Section 23 of Article III, supra, is not limited or circumscribed by exception (3) of said Section 37 of said Article III nor any reference thereto, by the exception noted in Section 23 of said Article III in the consideration of the question before us. From this viewpoint we will proceed to determine whether the acknowledgment of an obligation against the State in favor of the owner of the property so alleged to have been destroyed, by the inclusion in the proposed Omnibus Bill of an appropriation of public funds to pay the owner of such property for his loss, is in conflict with the said first clause of Section 23 of said Article III in that the proposed Omnibus Bill would contain more than one subject not clearly expressed in the title.

The acknowledgment of the liability of the State in occurrences of the character here being considered would be a subject and legislation thereon in the nature of general legislation. An appropriation from the general revenue of the State if included in the Omnibus Bill, to pay the loss to the property owner in this instance, would itself be, we believe, an acknowledgement of such liability. The proposed Omnibus Bill would then constitute legislation on two subjects in one Act. The first clause of Section 23 of Article III of our present Constitution prohibits such legislation. Our Supreme Court has had occasion in numerous cases to construe the same terms now appearing in the first clause of Section 23 of Article III of the present Constitution as Section 28 of Article IV of the Constitution of 1875. We shall cite and quote from some of such decisions in which it is held that no bill shall contain more than one subject and that legislation of a general nature may not be included in an Appropriation Bill.

This question was before our Supreme Court in State ex rel. vs. Smith, 75 S.W. (2d) 828. The suit was in mandamus to compel the State Auditor to issue a warrant for the payment for personal services rendered by relator as a member of the State Board of Barber Examiners. The Legislature at its Extra Session, which convened in October, 1933, appropriated out of the State treasury, chargeable to the general revenue, the sum of \$3,000.00 to the Board of Barber Examiners' Fund. The opinion recites, however, that although the \$3,000.00 so appropriated was actually transferred to the Barber Examiners'

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Fund that the sum had not been used, and was at the time of the institution of the suit, in the State Treasury to the credit of the Board of Barber Examiners' Fund. The relator claimed there was due him out of said sum, the sum of \$125.00. The relator presented to the State Auditor a statement, setting forth the services rendered, the amount due therefor, with the approval of the Secretary of the Board, and requested a warrant upon the State Treasurer in payment thereof. The State Auditor refused payment because Section 13525, R.S. Mo. 1929, provided that the salary of the members of the Board as well as all expenses, should be paid out of a fund created from fees collected by the Board or its Treasurer, and out of that fund only, and for that reason the Legislature had no authority to appropriate money out of the General Revenue Fund to pay such expenses. The opinion recites that the Legislature might have provided that the salary and expenses of the Barber Board might be paid out of the General Revenue, but that it did not do so, but, on the contrary, stated that such expenses should be paid out of the special fund named, and out of that fund only, and that the attempt to pay for such services out of the General Revenue Fund was contrary to said Section 13525. The Court, in holding that the effect of the appropriation of the \$3,000.00 out of the General Revenue Fund for the payment of such expense of said Board was in the nature of general legislation and could not be included in an Appropriation Act and was invalid as in conflict with Section 28 of Article IV of the then existing Constitution, l.c. 830, said:

"It cannot be said that the act appropriating \$3,000 from the general revenue fund to the board of barber examiners' fund amounted to an amendment of section 13525, R.S. 1929 (Mo. St. Ann. Sec. 13525, p. 637). It does not attempt to amend that section. Its sole purpose was to appropriate \$3,000 from one fund to another. It reads as follows:

"There is hereby appropriated out of the state treasury, chargeable to the general revenue fund, the sum of three thousand (\$3,000.00) dollars to the Board of Barber Examiners Fund." (Laws 1933-34, p. 12, Sec. 12B).

"Besides, legislation of a general character cannot be included in an appropriation bill. If this appropriation bill had attempted to

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amend section 13525, it would have been void in that it would have violated Section 28 of article 4 of the Constitution which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no doubt but what the amendment of a general statute such as section 13525, and the mere appropriation of money are two entirely different and separate subjects. * * * ."

The Revised Statutes of this State, 1929, included Section 9622, providing that in case Lincoln University at Jefferson City, Missouri, a university for the education of colored students, did not furnish opportunity to colored students for legal training equal to that furnished white students at the University of Missouri, the Board of Curators of Lincoln University could pay the reasonable tuition fees of such colored students, residents of Missouri, for attendance at the university of any adjacent State.

The Legislature of 1935 (Laws of Missouri, 1935, page 113, Section 60) passed the following Act, to-wit:

"* * * There is hereby appropriated out of the State Treasury chargeable to the general revenue fund for the years 1935 and 1936, the sum of Ten Thousand Dollars (\$10,000.00) to be used in paying the tuition of negro college students to some standard college or university not located in Missouri, * * * provided that the total amount paid shall not exceed the difference between the registration and incidental fees charged by the University of Missouri to resident students and the school attended for similar courses."

The Supreme Court in the case of State ex rel. Gaines vs. Canada, 113 S.W. (2d) 783, construed both Sections 9622, R.S. Mo. 1929, and Section 60 of the Act of 1935 (Laws of Missouri, 1935, page 113). The enactment of said Section 60, the Court held, was in the nature of general legislation which could not be combined in the same Act with an appropriation because it was contrary to the terms of Section 28 of Article IV of the then existing Constitution of this State. The Court in so holding, 1.c. 790, said:

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"* * * A general statute (section 9622, R.S. 1929 (Mo. St. Ann. Sec. 9622, p. 7328)) authorizes the board of curators of Lincoln University to pay the reasonable tuition fees of negro residents of Missouri for attendance at the university of any adjacent State. This statute cannot be repealed or amended except by subsequent general legislation. Legislation of a general character cannot be included in an appropriation bill. To do so would violate section 28 of article 4 of the Constitution, which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no question but what the mere appropriation of money and the amendment of section 9622, a general statute granting certain authority to the board of curators, are two different and separate subjects. * * * ."

An original proceeding in mandamus was before our Supreme Court in State ex rel. vs. Thompson, 289 S.W. 338. The facts recited in the opinion were that relator, Hueller, on February 22, 1925, was appointed an Assistant Commissioner of the Permanent Seat of Government of this State at a monthly salary of \$135.00. The Board of Permanent Seat of Government later by order at a meeting of the Board increased the compensation of relator to \$150.00 per month. Respondent, Thompson, State Auditor, refused to pay relator's compensation at the increased figure. Relator refused to accept any other sum and later instituted the action. The General Assembly of 1925 (Laws of Missouri, 1925, page 36, et seq.) later passed an Act, Section 100 of which Act read as follows:

"* * * No salary for any official or employee, either elective or appointive, provided for by this appropriation act, shall be in excess of the salary provided by statutory law for such official or employee, and in all cases where the salary of any such official or employee is not definitely fixed by statutory law, no salary paid by virtue of this appropriation act shall be in excess of the salary paid to the officer or employee holding such position the previous biennium."

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The authority creating the Board of Permanent Seat of Government with certain powers conferred upon it was in Chapter 84, R.S. Mo. 1919, and amendments thereto. An Act passed by the General Assembly (Laws of Missouri, 1923, page 301) enjoined upon the Board the duty of protecting and caring for the State's property, including the capitol building at the seat of government and the employment and fixing the salaries of officers and employees of the Board. This being true, the opinion recites, the Board had the right to increase the salary of relator unless it was precluded from so doing by certain provisions of said Section 100, supra, (Laws of Missouri, 1925). The decision of the Court was that said Section 100 of the Appropriation Act was unconstitutional and void because it sought to fix the salaries of all such officers or employees affected by the Appropriation Act. The Court held the remainder of said Act of 1925 (Laws of Missouri, 1925, page 36, et seq.) valid. In holding said Section 100 invalid, the Court, l.c. 340 and 341, said:

"It is manifest that the real purpose of this provision was an undertaking to regulate, determine, and fix the salaries of all such officers or employees affected by the Appropriation Act whose compensation might not be fixed at all by statutory law, or, if at all, where the statute fixed a maximum only. This provision has no other character than that of general legislation, and to inject general legislation of any sort into an appropriation act is repugnant to the Constitution (article 4, sec. 28, Constitution of Mo.), and the appropriation bill, as provided by the Constitution (article 4, section 28), may have a plurality of subjects, while a bill for general legislation may have but one.

"An appropriation bill is just what the terminology imports, and no more. Its sole purpose is to set aside moneys for specified purposes, and the lawmaker is not directed to expect or look for anything else in an appropriation bill except appropriations.
* * *

* * * * *

"Our Constitution (section 28, art. 4) is the

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one certain safeguard against such distracting possibilities and should be strictly followed. We hold, therefore, that section 100 of the Appropriation Act, under our Constitution, is unconstitutional and void, and it follows that our preemptory writ of mandamus should be granted."

If this appropriation should be enacted and liability of the State be admitted it would be legislation of a general character and would constitute a statute fixing liability upon the State in such cases. The Legislature does have the right to pass general legislation providing for the fixing of liability upon the State in such cases, but it has not done so, and, under the above authorities cited and quoted, this cannot be done in an Appropriation Act. We believe there is no question but what admitting the fact of liability upon the State and the appropriation of money to pay such liability are two distinct subjects.

If the claim upon which the Appropriation Act here considered is based is not a legal or legitimate claim against the State, and we hold herein that it is not legitimate or legal, were allowed as a part of the Omnibus Bill now pending before the General Assembly, the Comptroller would be prohibited from certifying it to the State Auditor and the State Treasurer for payment under the terms of Section 33.200, RSMo 1949, which reads as follows:

"If the comptroller shall knowingly certify any claims or accounts for payment by the auditor, not authorized by law, he shall, upon conviction thereof, be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for not less than two years nor more than five years."

In consideration of the above authorities it is clear, we believe, that the proposed claim is not a legitimate claim against the State; that there is no statute in this State fixing liability upon the State for the acts of officers or agents of the State or for the acts of inmates of the State's corrective or rehabilitation institutions such as the said Bellefontaine Farms; that the appropriation, if made in this instance, would be the grant and payment of public money to an individual in

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violation of Section 38 (a) of Article III of the Constitution of this State; that the appropriation, if made, would be unconstitutional and contrary to the terms of Section 23 of Article III of the Constitution, and that if such an Appropriation Act were passed in the light of the authorities herein cited and quoted, the Comptroller is prohibited by said Section 33.200 from giving it his approval and certification to the State Auditor and State Treasurer for payment; and, that for these reasons the said subject of such appropriation should not be included in the said proposed Omnibus Bill.

CONCLUSION.

It is therefore the opinion of this department considering the above cited authorities and for the foregoing reasons, that a claim for damages against the State by the owner of property destroyed, if it was so destroyed, by an incendiary fire occasioned by inmates of Bellefontaine Farms, a part of the equipment of the Missouri State School for feeble-minded and epileptic persons at St. Louis, Missouri, a State institution, is not a legal claim against the State.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

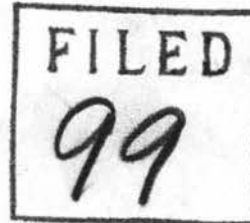
APPROVED:


J. E. TAYLOR
Attorney General

GWC:ir

SHERIFFS: The taking of a prisoner before the court for trial or
FEES: confession of guilt by the sheriff does not constitute
attendance upon such court by the sheriff. The sheriff
is entitled to a fee of \$1.00 for taking the prisoner
before the court for trial or confession.

January 3, 1951



Mr. A. L. Wright
Prosecuting Attorney
Stone County
Crane, Missouri

Dear Sir:

We have received the following letter from you requesting
an official opinion by this department:

"The sheriff, magistrate and county court
are in continuous difficulty over the
question of when the sheriff is entitled
to the statutory fee of \$3.00 per day for
waiting on the court.

"The sheriff makes this charge for any day
when he has taken a prisoner before the court
for a plea of guilty. Your office, I believe,
has previously given the opinion that he is
entitled to this fee when requested by the
magistrate to attend.

"The sheriff takes the position that he is
compelled to take the prisoner before the
court and that when he does so the court is
in session and transacts court business and
he is required to wait on the court although
he has not been requested to do so. Also if
a fine is paid, under the law he is the only
one who can receive the fine and costs, he
has to receive this money run it on his books
and pay it out to the proper officers. In
such cases if the magistrate says that he did
not request him to attend court, then under
your ruling he would not be entitled to this
fee."

Section 13411, R. S. Mo. 1939, which will be Section 57.28
R. S. Mo. 1949, provides for fees to be allowed sheriffs for their
services and provides for attending each court of record or

Mr. A. L. Wright

criminal court and for each deputy actually employed in attendance upon such court, the number of such deputies not to exceed three per day, the sum of three dollars. This fee is for actual attendance upon the court throughout the day while the court is in session. As we have pointed out in previous opinions by this department, it is necessary for the judge of the circuit, probate or magistrate court to request the sheriff to attend such court in order for the sheriff to be entitled to charge said sum of three dollars for such attendance. We are enclosing a copy of the opinion dated January 3, 1947, that was sent to John A. Eversole and we are enclosing a copy of the opinion dated June 7, 1950, sent to Christian F. Stipp. Both opinions discuss the situations where the sheriff is entitled to the fee of three dollars per day for attending said courts.

Section 57.29, R. S. Mo. 1949, H.B. 2051, Revision 1949, which was formerly Section 13413, R. S. Mo. 1939, provides, in part, as follows:

"Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases and for all proceedings for contempt or attachment as follows:

* * * * *

"For every trial in a criminal case or confession	1.00"
--	-------

* * * * *

This is a fee that the sheriff is entitled to receive in all criminal cases when a prisoner is taken by the sheriff before the magistrate or circuit court in which the prisoner is tried or enters a plea of guilty. This constitutes part of the duties of the sheriff in connection with the arrest, prosecution, custody, care and commitment of persons accused of criminal offenses for which the sheriff is paid a salary as provided by Section 13, Art. VI of the new Constitution of 1945. Therefore this fee of \$1.00 must be turned over to the general revenue fund by the sheriff after it has been received by him.

The bringing of a prisoner before the magistrate or circuit court by the sheriff for trial or a plea of guilty does not constitute attendance upon such court. The sheriff takes the prisoner before such court in compliance with a warrant or commitment that has been issued by said court in which the sheriff is ordered to produce the body of the prisoner before said court. Neither does the collection by the sheriff of any fine and cost that is imposed

Mr. A. L. Wright

by the court, constitute attendance upon the court.

The Supreme Court of Missouri in 1940 in the case of Maxwell v. Andrew County, 146 S.W. 2d 621, l.c. 625, 626, said:

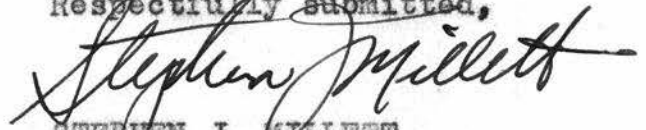
"It is well established law that the right of a public officer to be compensated by salary or fees for the performance of duties imposed on him by law does not rest upon any theory of contract, express or implied, but is purely a creature of the statute. * * *"

"* * *But if a hardship to the law enforcement officers is involved this is a matter for the consideration of the legislature and not the courts. He who accepts public office takes it cum onere. We are constrained to hold therefore that the payments made to the sheriff in this case were illegally made. * * *"


CONCLUSION

It is the conclusion of this department that the act of taking a prisoner before a circuit court or magistrate court for trial or a plea of guilty by the sheriff does not constitute attendance upon such court by the sheriff. The sheriff is entitled to a fee of \$1.00 for taking a prisoner before either the magistrate court or circuit court in all criminal cases in which the prisoner is tried or enters a plea of guilty. This fee is a criminal cost fee which must be accounted for by the sheriff and paid into the general revenue fund.

Respectfully submitted,


STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

SJM:mw

LOTTERIES: A contest in which entrants pay a cash consideration, and in which that entrant receives a cash prize who catches the largest fish within a specific period of time, is a lottery.

May 10, 1951

5-10-51



Honorable Thomas G. Woolsey
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

Your request for an official opinion has been assigned to me to answer. You thus state your opinion request:

"The Lion's Club at Gravois Mills, Missouri in this county, is seeking a determination as to whether or not a fishing derby as outlined herein would be a legitimate enterprise or would be classified as a lottery and hence illegal.

"The Club proposes to offer monthly cash prizes for the largest fish caught of one or more game species by any person who has entered the contest, then at the end of the year, annual prizes are to be awarded for the largest caught during the year by those who entered the contest or derby.

"The contest would be opened to the public, but naturally the entries would come from local residents and people patronizing our resort area here on the Lake of the Ozarks. The surplus, if any, above the cash prizes, would be used by the Lion's Club to further their campaign of community betterment.

"They feel that the catching of game fish such as bass and jack salmon, requires an element of skill rather than luck or chance.

"To win a prize under this proposed contest or derby would require a legal effort by the contestants rather than a mere attendance or a drawing at some gathering."

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Subsequent to writing the above opinion request, you supplemented, at our request, the information contained therein by the following letter:

"This will acknowledge receipt of and thank you for your letter of February 28th seeking additional information for a determination of the question I submitted to you on February 23rd.

"Please accept my apologies for not being more explicit in the original request.

"The club proposes to charge a nominal cash entry fee to any person entering the contest. The amount charged will probably be \$1.00 or less."

In order to decide whether the procedure which you contemplate is or is not a lottery we must first determine the elements which must necessarily be present in order to constitute a lottery.

In the case of State v. Globe Democrat Publishing Company, 110 S.W. 2d 705, 1.c. 713, the Court stated: "The elements of a lottery are: (1) Consideration; (2) Prize; (3) chance."

Subsequent appellate court decisions in Missouri have undeviatingly sustained the above declaration as to the constituent elements of a lottery. If all of these elements are present there is a lottery. If any one of them is absent there is no lottery.

In your second letter to this office you state that:

"The club proposes to charge a nominal cash entry fee to any person entering the contest. The amount charged will probably be \$1.00 or less."

Thus, very plainly the element of "consideration" is here present.

In your first letter to this office you state that: "The club proposes to offer monthly cash prizes * * *." Thus, it is clear that the second element of a "prize" is also present.

There remains therefore to be determined whether the third element of "chance" is also present.

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We will begin our consideration of this point by observing that in the great majority of lottery cases which have reached our appellate courts, the element of "chance" was clearly "pure or absolute chance," or was an arbitrary selection of the winner by the person or persons conducting the lottery. The latter method of arbitrary selection was that which was employed in the case of *State v. Emerson*, 318 Mo. 633. In *State v. McEwan*, 343 Mo. 213, the prize was given to the person whose name was drawn by lot from a list of names recorded in a theater's registration book.

As we said above, the great majority of lottery cases are similar to one or the other of the two cited above, where the winner is determined arbitrarily or by lot, which is to say, by "pure or absolute chance."

However, the instant case does not clearly fall within either of the two above mentioned categories. In it there is no arbitrary selection of the winner. And it seems probable that success in angling is not altogether at least a matter of "pure or absolute chance," but that, on the contrary, the element of skill is in some degree a factor in success.

For a thorough discussion of the part that the element of skill has in relation to the element of "chance" in determining whether this latter element is present as a constituent element of a lottery, we again direct attention to the case of *State v. Globe Democrat Publishing Company*, supra.

In that case the newspaper ran a series of cartoons, each one of which was designed as to suggest the name of a famous or notorious personage well known to the public. It was designated as a "Famous Names" contest. The winner of that contest would be that individual who, in the greatest number of instances, correctly deduced the name intended by the designer of the cartoon to be suggested by the cartoon. The appellant maintained that success in this contest would be to a dominant extent influenced by "skill, knowledge, experience, ingenuity, observation, and judgment of the contestants * * *."

Of this matter of skill and chance, the Missouri Supreme Court, in the above case, stated, l.c. 713:

"The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. It is conceded that the first two of these were present in the 'Famous Names' contest, here involved, the sole question being whether the third element - chance -

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was there. In England and Canada where the 'pure chance doctrine' prevails a game or contest is not a lottery even though the entrants pay a consideration for the chance to win a prize, unless the result depends entirely upon chance. In the United States the rule was the same until about 1904; but it is now generally held that chance need be only the dominant factor. 38 C.J. sec. 5, p. 291; 17 R.C.L. sec. 10, p. 1223; Waite v. Press Publishing Ass'n. 155 F. 58, 85 C.C.A. 576, 11 L.R.A. (N.S.) 609, 12 Ann. Cas. 319. Hence a contest may be a lottery, even though skill, judgment, or research enter therein to some degree, if chance in a larger degree determines the result. Whether the chance factor is dominant or subordinate is often a troublesome question."

The Court also stated at l.c. 717:

"It is impossible to harmonize all the cases. But we draw the conclusion from them that where a contest is multiple or serial, and requires the solution of a number of problems to win the prize, the fact that skill alone will bring contestants to a correct solution of a greater part of the problems does not make the contest any the less a lottery if chance enters into the solution of another lesser part of the problems and thereby proximately influences the final result. In other words, the rule that chance must be the dominant factor is to be taken in a qualitative or causative sense rather than in a quantitative sense. This was directly decided in Coles v. Odhams Press, Ltd., supra, when it was held the question was not to be determined on the basis of the mere proportions of skill and chance entering in the contest as a whole.

"The same thought is reflected in Eastman v. Armstrong-Byrd Music Co., supra, where it was stated that, if a contest 'rests upon a determination in whole or in part by chance,' it is a lottery; and in Commonwealth v. Theatre Advertising Co., 286 Mass. 405, 410, 190 N.E. 518, 520, which proceeds on the theory that the true inquiry is whether chance inheres in the contest, or whether it is merely incidental;

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and in *Horner v. United States*, 147 U.S. 449, 459, 13 S.Ct. 409, 413, 37 L.Ed. 237, where a scheme for selling bonds was held a lottery because 'the element of certainty goes hand in hand with the element of lot or chance, and the former does not destroy the existence or effect of the latter.' In the instant case it stands conceded that at the beginning of the 'Famous Names' contest the cartoons were comparatively simple and the list of suggested titles was short. This made the contest inviting to entrants. But toward the end the cartoons became more 'subtle' and as many as 180 titles had to be considered. It was a weeding out process, undoubtedly; and if chance inhered in the solution of these latter cartoons, though only a few of them, and eliminated a large number of contestants, then it must be said the result was influenced by chance."

It appears to us that the element of chance is less, and the element of skill is greater, in the "Famous Names" contest discussed above, than in a contest in which the winner will be determined by the size of a fish that he catches. But the Missouri Supreme Court held, in the case discussed above, that the element of chance was present in sufficient degree to constitute the general scheme a lottery; that the element of chance was the "dominant" element rather than skill. It, therefore, follows, assuming our first premise to be correct, that the element of chance is present in the instant case, that the instant case is therefore a lottery, since the elements of "consideration" and "prize", are also present, and that the proposed operation is therefore prohibited by law.


CONCLUSION

It is the opinion of this department that a contest in which entrants pay a cash consideration, and in which that entrant receives a cash prize who catches the largest fish within a specific period of time, is a lottery.

Respectfully submitted,

APPROVED:

HUGH P. WILLIAMSON
Assistant Attorney General


J. E. TAYLOR
Attorney General

COUNTY COURT
VACATION OF COUNTY ROADS:
EXECUTION OF QUIT CLAIM DEEDS
EXTINGUISHING EASEMENT:

County court may vacate county road upon petition of twelve freeholders. Road right of way not used within preceding ten years extinguished by operation of law.

August 29, 1951

Honorable Thomas G. Woolsey
Prosecuting Attorney
Versailles, Missouri

Dear Mr. Woolsey:

We have your recent letter in which you request an opinion of this department. Your letter is as follows:

"I would appreciate your rendering me an opinion, at your earliest convenience, as to whether or not a County Court may declare a former County Road abandoned upon a petition brought by adjoining land owners.

"I would also appreciate an opinion as to whether or not a County Court may give a Quit Claim Deed to the adjacent land owners, to an abandoned right of way, originally obtained by prescription and which, to the best knowledge and belief of the Court is no longer needed for road purposes and has not been used, as such, more than ten years."

Your first question is whether or not a county court may declare a former county road abandoned upon a petition brought by adjoining landowners. Section 228.190, RSMo 1949, is as follows:

"All roads in this state that have been established by any order of the county court and have been used as public highways for a period of ten years or more, shall be deemed legally established public roads; and all roads that have been used as such by the public for ten years continuously, and upon which there shall have been expended public money or labor for

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such period, shall be deemed legally established roads; and nonuser by the public for ten years continuously of any public road shall be deemed an abandonment and vacation of the same."

(Emphasis ours.)

We are of the opinion that the above quoted language of the statute warrants the opinion that a county road not used by the public within the preceding ten years period is actually abandoned and vacated by operation of law.

Section 228.110, RSMo 1949, is as follows:

"1. Any twelve freeholders of the township or townships through which a road runs may make application for the vacation of any such road or part of the same as useless, and the repairing of the same an unreasonable burden upon the district or districts. The petition shall be publicly read on the first day of the term at which it is presented, and the matter continued without further proceedings until the next term.

"2. Notice of the filing of such petition and of the road sought to be vacated shall be posted up in not less than three public places in such township or townships, at least twenty days before the first day of the next term of the court, and a copy of the same shall be personally served on all the persons residing in said district whose lands are crossed or touched by the road proposed to be vacated in the same manner as other notices are required to be served by law; and at the next regular term the same shall again be publicly read on the first day thereof.

"3. If no remonstrances be made thereto in writing, signed by at least twelve freeholders, the court may proceed to vacate such road, or any part thereof, at the cost of the petitioners; but if a remonstrance thereto in writing, signed

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by at least twelve freeholders, residents of such township or townships, be filed, and the court after considering the same shall decide that it is just to vacate such road, or any part thereof, against the vacation of which the remonstrance was filed, the costs shall be paid by the parties remonstrating, and the original costs, and damages for opening such vacated road shall be paid by the petitioners to those who paid the same; provided that if five years have elapsed since the original opening of the same no such reimbursement shall be made."

We find no statutory provision for the vacation of county roads by action of the county court other than the provision made by the last above quoted statute and we comment that action by the county court under this section for the vacation of a county road is not limited to roads that have not been used by the public during the preceding ten years and we comment that the petitioners who initiate the proceeding for the vacation are not limited by the statute to adjoining land owners but rather to freeholders of the township, or townships, through which the road runs.

In our opinion of July 12, 1949, addressed to Honorable Robert G. Kirkland, Prosecuting Attorney of Clay County, Missouri, a copy of which we are enclosing herewith, we held that a county court may order a public road vacated upon a finding that no necessity for such road exists. It occurs to us that said opinion should be helpful to you.

In answer to your second question which is whether or not the county court may lawfully execute a quit claim deed conveying to the adjacent land owners an abandoned right of way originally obtained by prescription and no longer needed for road purposes, and which has not been used for road purposes for the preceding ten years we comment that a right of way originally obtained by prescription constitutes an easement over the land which it crosses. The following is a quotation from Volume 2 of Thompson on Real Property, Section 524, Page 113:

"* * * Before a prescriptive right can be established in the public, there must have been a public use of the land exclusive of

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the private rights of the owner. Thus, for a municipality to establish a public way by prescription it must prove an adverse use of the land, which has continued for the requisite period of time under claim of right and without the acquiescence of the owner or his predecessors in title in such use."

We suggest the fact that an easement has been said to be " * * * a charge or burden upon one estate for the benefit of another. * * * " (Thompson on Real Property, Volume 1, Section 315, Page 503.)

We are of the opinion that under the provisions of Section 228.190, RSMo 1949, the right of way described by you has been abandoned and vacated by operation of law and that the easement has been extinguished and that the charge or burden thereof on the land formerly traversed by the right of way has been extinguished and that said land is now free from the encumbrance of the easement and that any quit claim deed purporting to extinguish said right of way would be unnecessary and ineffective and therefore, for that reason, if for no other reason, the execution by the county court of a quit claim deed to the adjoining landowners is beyond the authority of the court.

CONCLUSION


We are accordingly of the opinion that under the provisions of Section 228.110, RSMo 1949, a county court pursuant to a petition filed by twelve freeholders of the township or townships through which a county road runs may vacate a county road provided all of the provisions of said sections shall be complied with.

We are of the further opinion that in view of the provisions of Section 228.190, RSMo 1949, an abandoned road right of way originally obtained by prescription and not used in the last ten years has been extinguished by operation of law and that the land across which it runs is no longer encumbered by an easement for road purposes and that the execution of a quit claim deed by the county court is unnecessary and ineffective and is for that reason, if for no other, beyond the authority of the court.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General